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OKLAHOMA REPORTS

VOLUME XLI

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

State of Oklahoma

(Opinions of the Supreme Court Commission)

November, 1913—April, 1914

HOWARD PARKER, *State Reporter*

012/32/21



WARDEN COMPANY, OKLAHOMA CITY

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JUSTICES OF THE SUPREME COURT

OF THE

STATE OF OKLAHOMA

During the period covered by this volume

SAMUEL W. HAYES ¹	Chief Justice
MATTHEW J. KANE ²	Vice Chief Justice
R. L. WILLIAMS ³	Justice
JOHN B. TURNER ⁴	Justice
R. H. LOOFBOURROW	Justice
STILLWELL H. RUSSELL ⁵	Justice
F. E. RIDDLE ⁶	Justice

SUPREME COURT COMMISSION

Division No. 1

J. B. A. ROBERTSON¹
J. F. SHARP
CHAS. M. THACKER
GEO. B. RITTENHOUSE²

Division No. 2

P. D. BREWER
J. B. HARRISON
C. A. GALBRAITH

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HOWARD PARKER	Reporter
W. T. FIELD	Marshal
S. O. DAWS	Librarian

¹Resignation effective April 8, 1914.

²Elected Chief Justice April 10, 1914.

³Resignation effective March 10, 1914.

⁴Elected Vice Chief Justice April 10, 1914.

⁵Appointed March 10, 1914, to succeed R. L. Williams.

⁶Appointed April 8, 1914, to succeed Samuel W. Hayes.

¹Resignation effective February 2, 1914.

²Appointed February 2, 1914, to succeed J. B. A. Robertson.

JUDGES OF THE DISTRICT COURTS

At the present time (September, 1914)

Dist.

1.	JOHN H. PITCHFORD.....	Tahlequah
2.	T. L. BROWN.....	Claremore
3.	FRED P. BRANSON.....	Muskogee
3.	R. P. DeGRAFFENREID.....	Muskogee
4.	PRESLIE B. COLE.....	McAlester
5.	W. H. BROWN.....	Stigler
6.	JESSE M. HATCHETT.....	Durant
7.	TOM D. McKEOWN.....	Ada
8.	A. E. EDDLEMAN.....	Marietta
9.	JOHN CARUTHERS.....	Okemah
10.	CHAS. B. WILSON, Jr.....	Chandler
11.	A. H. HUSTON.....	Guthrie
12.	W. M. BOWLES.....	Perry
13.	GEO. W. CLARK.....	Oklahoma City
13.	JNO. J. CARNEY.....	El Reno
13.	W. R. TAYLOR.....	Oklahoma City
14.	ROBINSON McMILLAN.....	Norman
15.	FRANK M. BAILEY.....	Chickasha
15.	J. T. JOHNSON.....	Lawton
17.	JAMES R. TOLBERT.....	Hobart
18.	G. A. BROWN.....	Mangum
19.	W. C. CROW.....	Guymon
20.	JAMES B. CULLISON.....	Enid
20.	J. W. STEEN.....	Enid
21.	L. M. POE.....	Tulsa
22.	WADE S. STANFIELD.....	Sapulpa
23.	PRESTON S. DAVIS.....	Vinita
24.	R. H. HUDSON.....	Pawhuska
25.	FRANK MATHEWS.....	Altus
26.	ROBT. M. RAINEY.....	Atoka
27.	SUMMERS HARDY.....	Hugo

JUDGES OF COUNTY SUPERIOR COURTS

Name	County and Post-Office
ABERNATHY, G. C.....	Pottawatomie County, Shawnee
LIEDTKE, W. C.....	Pittsburg County, McAlester
HUETT, DANIEL.....	Garfield County, Enid
OLDFIELD, EDW. D.....	Oklahoma County, Oklahoma City
THURMAN, H. C.....	Muskogee County, Muskogee
BRECKENRIDGE, M. A.....	Tulsa County, Tulsa
LAWTER, J. W.....	Custer County, Clinton

ACTS CREATING AND CONTINUING SUPREME COURT COMMISSION.

House Bill No. 75

AN ACT providing for the appointment by the Supreme Court of six Supreme Court Commissioners to be divided into two divisions, prescribing their qualifications, defining their powers and duties, fixing their salaries, providing for clerical assistance, and declaring an emergency.

Be it Enacted by the People of the State of Oklahoma:

SECTION 1. OFFICES CREATED — QUALIFICATIONS — APPOINTMENT—TERM—SALARY. The Supreme Court of the State of Oklahoma, shall at once upon the passage and taking effect of this act, appoint six (6) persons as Commissioners of the Supreme Court, one from each Supreme Court judicial district and one from the state at large, each having the qualifications required for the office of Justice of the Supreme Court of this state. The Supreme Court shall issue to each a commission, which shall be recorded on the minutes of the Supreme Court. Each of said Commissioners to hold office for a term of two years, from and after his appointment, and at the end of two years after the first Commission has been appointed this Commission shall expire. All vacancies in the office of said Commissioners to be filled in the same manner as is required in the appointment of the Commissioners as hereinbefore provided. Commissioners so appointed shall not be permitted to practice as attorneys before any court of this state during their term of office. Said Commissioners shall be divided into two divisions, to be known as Supreme Court Commissioner divisions, numbers one and two; the members of each division to be designated by the Supreme Court. Each of said Commissioners shall receive a salary of thirty-six hundred dollars per annum, which shall be payable at the same time and in the same manner as is the salary of the Justices of the said Supreme Court. Each Commissioner, before entering upon the discharge of the duties of his office, shall take and subscribe to the constitutional oath of office prescribed for other state officials.

SECTION 2. DUTIES. It shall be the duties of said Supreme Court Commissioners, under such orders, rules and regulations as such Supreme Court may adopt, to assist the said court in the disposing of the causes now pending or hereafter brought to said court by appeal or otherwise. Said Commission in all causes submitted to it for examination, shall make its findings and opinions in writing to the Supreme Court to be remanded, adopted or rejected, in whole or in part, under such rules and regulations as the court may prescribe, and the court shall render such opinion or opinions and enter such judgment in such causes as the court may deem proper.

SECTION 3. CLERICAL HELP—OFFICES AND SUPPLIES. The said Commission may appoint such clerical and stenographic help as the necessities of said Commission may require, fixing the compensation for such help not to exceed the amount paid for such like services performed for the members of the Supreme Court, and such Commission may procure office rooms and office furniture, supplies and necessities for conducting the business required of said Commission; all of which to be paid for on purpose vouchers approved by said court.

SECTION 4. EMERGENCY. For the immediate preservation of the public health, peace and safety an emergency is hereby declared by reason whereof this act shall take effect from and after its passage and approval.

Approved March 25, 1911.
(Sess. Laws 1910-11, p. 354.)

House Bill No. 257.

AN ACT providing for Supreme Court Commissioners, and extending in force until the first day of February, A. D. 1915, provisions of an act entitled: "An Act providing for the appointment by the Supreme Court of six Supreme Court Commissioners to be divided into two divisions, prescribing their qualifications, defining their powers and duties, fixing their salaries, providing for clerical assistance, and declaring an emergency." And further empowering the Supreme Court to appoint successors in office to the present Commissioners, on expiration of their terms of office, as fixed by the act hereby extended.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. DURATION OF COMMISSION EXTENDED TO 1915—VACANCIES—DIVISIONS—SALARIES. The Supreme Court of the State of Oklahoma, shall upon the expiration of the term of office of the present Commissioners of the Supreme Court, as provided by an act approved March 25, 1911, establishing said Commission, appoint six persons as Commissioners of the Supreme Court, one from each Supreme Court judicial district, and one from the state at large, each having the qualifications required for the office of Justice of the Supreme Court of this state. The Supreme Court shall issue to each a commission which shall be recorded on the minutes of the Supreme Court. Each of said Commissioners to hold office from the time of the appointment until the first day of February, A. D. 1915, provided that the Supreme Court may remove any Commissioner for cause, without assigning reason for same, at which time said appointment and said commission shall expire provided that said Commission shall be dissolved by the Supreme Court of this state at any time, in their opinion, they deem necessary. All vacancies in the office of said Commissioners, either by death, resignation or otherwise, shall be filled in the same manner as is required in the appointment of the Commissioners as hereinbefore provided. Commissioners so appointed shall not be permitted to practice as attorneys before any court of this state during the term of office. Said Commissioners shall be divided into two divisions, numbers one and two; the members of each division to be designated by the Supreme Court. Each of said Commissioners shall receive a salary of thirty-six hundred dollars (\$3,600.00) per annum, which shall be payable at the same time and in the same manner as is the salary of the Justices of the said Supreme Court. Each Commissioner, before entering upon the discharge of the duties of his office, shall take and subscribe to the constitutional oath of office prescribed for other state officials.

SECTION 2. DUTIES OF COMMISSIONERS. It shall be the duties of said Supreme Court Commissioners, under such orders, rules and regulations as such Supreme Court may adopt, to assist the said court in the disposing of the causes now pending or hereafter brought to said court by appeal or otherwise. Said Commission in all causes submitted to it for examination, shall make its findings and opinions in writing to the Supreme Court to be remanded, adopted or rejected, in whole or in part, under such rules and regulations as the court may prescribe, and the court shall render such opinion or opinions and enter such judgment in causes as the court may deem proper.

SECTION 3. STENOGRAPHERS—OFFICE ROOMS AND SUPPLIES. The Supreme Court may appoint such stenographic help as the necessities of said Commission may require, and fix the compensation for such help not to exceed the amount paid for such services

performed for the members of the Supreme Court, and may procure office rooms and office furniture, supplies, and necessities for conducting the business required by said Commission; all of which to be paid for on proper vouchers approved by said court.

SECTION 4. EMERGENCY. An emergency is hereby declared, by reason whereof it is necessary for the immediate preservation of the public peace and safety that this act take effect and be in force from and after its passage and approval.

Approved March 25, 1913.

(Sess. Laws 1913, p. 156.)

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- Mayor, etc., *City of Guthrie v. Ter. ex rel. Losey*, 1 Okla. 188. See *City of Guthrie v. New Vienna Bank*, 4 Okla. 196.
- Collier v. Territory*, 2 Okla. 444. See *Bettge v. Territory*, 17 Okla. 85.
- Brickner v. Sporleder*, 3 Okla. 561. See *Nix v. Gilmer*, 5 Okla. 740; *Johnson et al. v. Hays*, 6 Okla. 582.
- Pittman v. City of El Reno*, 4 Okla. 638. See *Oklahoma City v. Reed*, 17 Okla. 518.
- Cox v. United States*, 5 Okla. 701. See *Lincoln v. Territory*, 8 Okla. 546.
- Royce v. Territory*, 5 Okla. 61. See *Shivers v. Territory*, 13 Okla. 466.
- Keokuk Falls Imp. Co. et al. v. Kingsland & Douglas Mfg. Co. et al.*, 5 Okla. 32. See *James v. Citizens' Bank*, 9 Okla. 546; *Willoughby, Receiver, v. J. E. Ball*, 18 Okla. 535.
- Blevins v. Morledge & Allen*, 5 Okla. 141. See *First Nat. Bk. v. Okla. Nat. Bk.*, 29 Okla. 427.
- Wallace et al. v. Bullen et al.*, 6 Okla. 17. See *Gray et al. v. Stiles et al.*, 6 Okla. 455.
- Sowers v. Territory*, 6 Okla. 436. See *Benton v. Territory*, 15 Okla. 6; *Harmon v. Territory*, 15 Okla. 147.
- Gray et al. v. Stiles et al.*, 6 Okla. 455. See *Wallace v. Bullen*, 6 Okla. 757; *Bardrick et al. v. Dillon et al.*, 7 Okla. 535.
- Wade v. Gould*, 8 Okla. 690. See *Barse Live Stock Co. v. McKinster*, 10 Okla. 708.
- Betts et al. v. Mills*, 8 Okla. 351. See *Holmes v. Holmes*, 27 Okla. 140.
- Greenville N. Bk. v. Evans-Snyder-Buell Co.*, 9 Okla. 353. See *Frick Co. v. Oates et al.*, 20 Okla. 473; *Garrison et al. v. Street & Harper Furniture & Carpet Co.*, 21 Okla. 643.
- Rice v. West*, 10 Okla. 1. See *Richardson et al. v. Penny*, 6 Okla. 328.
- Mahaffey v. Territory*, 11 Okla. 213. See *Shivers v. Territory*, 13 Okla. 473.
- Powers v. Rude and C., R. I. & P. Ry. Co.*, 14 Okla. 381. See *Snyder v. Stribling*, 18 Okla. 168.
- Buxton v. Alton-Dawson Merc. Co.*, 18 Okla. 287. See *Spaulding v. Polley*, 28 Okla. 764.
- Block v. Pearson*, 19 Okla. 422. See *First Nat. Bk. v. Okla. Nat. Bk.*, 29 Okla. 427.
- First N. Bk. of Hennessey v. Farquharson et al.*, 22 Okla. 27. See *Smith-Premier T. Co. v. Grace, Sheriff*, 28 Okla. 844.
- Williams v. Steinmetz*, 16 Okla. 104. See *Holden v. Lynn*, 30 Okla. 663.
- Brown v. Yates*, 24 Okla. 231. See *Barnard v. Douglass-Whaley Gro. Co.*, 31 Okla. 124.
- Barnes v. Stonebraker*, 28 Okla. 75. See *Rentie et al. v. McCoy et al.*, 35 Okla. 88; *Deming Inv. Co. v. Bruner Oil Co. et al.*, 35 Okla. 401.
- Sanders v. Sanders et al.*, 28 Okla. 59. See *Rentie et al. v. McCoy et al.*, 35 Okla. 88; *Deming Inv. Co. v. Bruner Oil Co. et al.*, 35 Okla. 401.

OKLAHOMA CASES APPEALED TO THE CIRCUIT COURT OF APPEALS AND THE SUPREME COURT OF THE UNITED STATES

AFFIRMED.

- Smith v. Townsend, 1 Okla. 117; 148 U. S. 490.
 Dunham v. Holloway, 3 Okla. 244; 170 U. S. 615.
 Calhoun v. Violet, 4 Okla. 321; 173 U. S. 60.
 Browning et al. v. Deford, 8 Okla. 239; 178 U. S. 196.
 Bockfinger v. Foster et al., 10 Okla. 488; 190 U. S. 116.
 Queenan v. Territory, 11 Okla. 261; 190 U. S. 548.
 Pryer et al. v. Bryan et al., 11 Okla. 357; 189 U. S. 325.
 Pearce v. Territory, 11 Okla. 438; 118 Fed. 425.
 Winebrenner v. Forney, 11 Okla. 565; 189 U. S. 148.
 McMichael v. Murphy et al., 12 Okla. 155; 197 U. S. 304.
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 McCalla v. Acker, 15 Okla. 52; 200 U. S. 613.
 Nat. Live Stock Bank v. First N. Bank, Geneseo, 15 Okla. 194; 203 U. S. 296.
 Bennett v. Bennett, 15 Okla. 286; 208 U. S. 505.
 Southern Pine L. Co. v. Ward et al., 16 Okla. 131; 208 U. S. 126.
 Bogard et al. v. Sweet et al., 17 Okla. 40; 209 U. S. 464.
 Anderson et al. v. Shawnee Compress Co. et al., 17 Okla. 231; 209 U. S. 423.
 Drumm-Flato Com. Co. v. Edmisson, 7 Okla. 344; 208 U. S. 534.
 Waters-Pierce Oil Co. v. Deselms, 18 Okla. 107; 212 U. S. 159.
 Greenmeyer v. Coate, 18 Okla. 160; 212 U. S. 434.
 Snyder v. Stribling, 18 Okla. 168; 215 U. S. 261.
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 C., R. I. & P. Ry. Co. v. Territory, 21 Okla. 334; 220 U. S. 302.
 Noble State Bank v. Haskell, Governor, 22 Okla. 48; 219 U. S. 104.
 Coyle v. Smith, 28 Okla. 121; 221 U. S. 559.

CASES REVERSED.

- McDaid et al. v. Territory, 1 Okla. 92; 150 U. S. 209.
 Gay et al. v. Thomas et al., 5 Okla. 1; 169 U. S. 264.
 Cent. L. & T. Co. v. Campbell Com. Co., 5 Okla. 396; 173 U. S. 84.
 Potts v. Hollon, 6 Okla. 696; 177 U. S. 365.
 Romig et al. v. Gillett, 10 Okla. 186; 187 U. S. 111.
 Potter v. Hall, 11 Okla. 173; 189 U. S. 292.
 Sharp v. U. S., 13 Okla. 522; 138 Fed. 878.
 Robinson v. Territory, 16 Okla. 241; 148 Fed. 830.
 Beadles v. Smyser, Mayor, et al., 17 Okla. 162; 209 U. S. 693.
 Western Inv. Co. et al. v. Tiger, 21 Okla. 630; 221 U. S. 286.
 Gleason v. Wood, 28 Okla. 502; 224 U. S. 679.
 Choate v. Trapp, 28 Okla. 517; 224 U. S. 665.
 English v. Richardson, 28 Okla. 408; 224 U. S. 680.

CASES DISMISSED.

- Reaves et al. v. Oliver, 3 Okla. 62; 168 U. S. 704.
Sweet et al. v. Boyd et al., 6 Okla. 669; 20 Sup. Ct. 1019.
Paine v. Foster et al., 9 Okla. 213; 191 U. S. 562.
Comstock v. Eagleton, 11 Okla. 487; 196 U. S. 99.
Cunningham v. Morris, 12 Okla. 132; 194 U. S. 639.
New v. Territory, 12 Okla. 172; 195 U. S. 252.
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454; 196 U. S. 643.
Barnes et al. v. Turner et al., 14 Okla. 284; 199 U. S. 611.
Lee et al. v. Ellis, 16 Okla. 24; 203 U. S. 601.
Gillett v. Romig et al., 17 Okla. 324; 205 U. S. 535.
C., O. & G. Ry. Co. v. Burgess et al., 21 Okla. 653; 219 U. S. 590.
State ex rel. Haskell, Governor, v. Huston, Judge, et al., 21 Okla. 782;
215 U. S. 592.
Carleton v. Rushing, 26 Okla. 432; 32 Sup. Ct. 529.
Coalgate Company v. Hurst, 25 Okla. 58; 225 U. S. 697; 56 L. Ed.
1262.
Atwater v. Hassett et al., 27 Okla. 292; 33 Sup. Ct. 462, 227 U. S. 462.

INDIAN TERRITORY CASES OVERRULED

Shapleigh Hardware Co. v. Brittain, 2 Ind. T. 242. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.
Baldwin v. Ferris, 2 Ind. T. 438. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.
Morrow v. Burney, 2 Ind. T. 440. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.
Butler v. Penn, 3 Ind. T. 505. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.

INDIAN TERRITORY CASES APPEALED TO THE CIRCUIT COURT OF APPEALS AND THE SUPREME COURT OF THE UNITED STATES

AFFIRMED.

Badgett v. Johnston-Fife Hat Co., 1 Ind. T. 133; 85 Fed. 408.
Wilson v. Owens, 1 Ind. T. 163; 86 Fed. 571.
American Express Co. v. Lankford, 1 Ind. T. 233; 93 Fed. 380.
Swoffard Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 1 Ind. T. 314; 85 Fed. 417.
Davenport v. Buffington, 1 Ind. T. 424; 97 Fed. 234.
Harless v. United States, 1 Ind. T. 447; 92 Fed. 353.
Dorrance v. McAlester, 1 Ind. T. 473; 91 Fed. 614.
Case v. Hall, 2 Ind. T. 8; 94 Fed. 300.
American Express Co. v. Lankford, 2 Ind. T. 18; 93 Fed. 380.
Robinson v. Belt, 2 Ind. T. 360; 100 Fed. 719.
Liverpool & London & Globe Ins. Co. v. Kearney, 2 Ind. T. 67; 94 Fed. 314.
Noyes v. Guy, 2 Ind. T. 205; 100 Fed. 555.
M., K. & T. Ry. Co. v. Truskett, 2 Ind. T. 633; 104 Fed. 728.
Chandler v. Rutherford, 2 Ind. T. 379; 101 Fed. 774.
Fox v. Tyler, 3 Ind. T. 1; 109 Fed. 258.
Kimberlin v. Com. to Five Civilized Tribes, 3 Ind. T. 16; 104 Fed. 653.
Atoka Coal & Mining Co. et al. v. Adams et al., 3 Ind. T. 189; 104 Fed. 471.
Southwestern Coal & Imp. Co. v. McBride, 3 Ind. T. 223; 104 Fed. 1007.
Maxey et al. v. Wright, U. S. Ind. Insp., et al., 3 Ind. T. 243; 105 Fed. 1003.
Hardeman et al. v. Turner et al., 3 Ind. T. 338; 112 Fed. 41.
Rainwater-Bradford Hat Co. et al. v. McBride et al., 3 Ind. T. 621; 117 Fed. 597.
Ellis v. Fitzpatrick, 3 Ind. T. 656; 118 Fed. 430.
Muskogee Nat. Tel. Co. v. Hall et al., 4 Ind. T. 18; 118 Fed. 382.
Gentry v. Singleton, 4 Ind. T. 346; 128 Fed. 679.
Holford v. James et al., 4 Ind. T. 632; 136 Fed. 553.
Sass & Crawford v. Thomas et al., 6 Ind. T. 60; 152 Fed. 627.

- Capital Townsite Co. v. Fox et al., 6 Ind. T. 223; 152 Fed. 697.
 Smith v. Armour Packing Co., 6 Ind. T. 479; 158 Fed. 86.
 Choctaw, O. & G. R. Co. v. Bond, 6 Ind. T. 515; 160 Fed. 403-405.
 Guarantee Gold Bond, Loan & Savings Co. v. Edwards et al., 7 Ind. T. 297; 164 Fed. 809.
 Harper v. United States, 7 Ind. T. 437; 170 Fed. 386.
 Hayes v. Barringer, 7 Ind. T. 697; 168 Fed. 221-222.

CASES REVERSED.

- Chicago, R. I. & P. Ry. Co. v. Pounds, 1 Ind. T. 51; 82 Fed. 217.
 Raymond v. Raymond, 1 Ind. T. 334; 83 Fed. 721.
 Moffett-West Drug Co v. Byrd, 1 Ind. T. 612; 92 Fed. 290.
 Hargardine-McKittrick Dry Goods Co. v. Bradley, 1 Ind. T. 650; 96 Fed. 914-916.
 Ranney-Alton Merc. Co. v. Mineral Belt Const. Co., 2 Ind. T. 134; 104 Fed. 595.
 McFadden & Blocker, 2 Ind. T. 260; 105 Fed. 293-312.
 Westchester Fire Ins. Co. v. Blackford, 2 Ind. T. 370; 101 Fed. 90.
 Sangor v. Hibbard, 2 Ind. T. 547; 104 Fed. 455-457.
 Shapard Grocery Co. et al. v. Hynes, 3 Ind. T. 74; 104 Fed. 449.
 Foster et al. v. McAlester et al., 3 Ind. T. 307; 114 Fed. 145.
 Swift & Co. v. Guy, 3 Ind. T. 756; 97 Fed. 443.
 In re Estate of Geo. W. Taylor, 5 Ind. T. 219; 145 Fed. 169.
 Stancelift v. United States, 5 Ind. T. 486; 139 Fed. 806.
 Wilhite v. Skelton, 5 Ind. T. 621; 149 Fed. 67.
 Gulf C. & S. F. Ry. Co. v. Miseley, 6 Ind. T. 369; 161 Fed. 72.
 M., K. & T. Ry. Co v. Wilhoit, 6 Ind. T. 534; 160 Fed. 440-442.
 Atoka Coal & Mining Co. v. Miller, 7 Ind. T. 104; 170 Fed. 584.

CASES DISMISSED.

- Kelly et al. v. Johnson, 1 Ind. T. 184; 82 Fed. 1002.
 G. W. Walker Trading Co. v. Grady Trading Co., 1 Ind. T. 191; 81 Fed. 1003.
 Noble v. Worthy, 1 Ind. T. 458; 91 Fed. 1003.
 Noble v. Worthy, 1 Ind. T. 523; 91 Fed. 1003.
 McMillan v. McKee, 2 Ind. T. 529; 102 Fed. 1004.
 Tynon et al. v. Crowell, 3 Ind. T. 345; 109 Fed. 1063.
 Stephenson v. Osage Coal & Mining Co., 3 Ind. T. 567; 115 Fed. 1021.
 Forsythe v. U. S. ex rel. Isperhecher, 3 Ind. T. 599; 115 Fed. 1019.
 Binyon v. U. S., 4 Ind. T. 642; 195 U. S. 523.
 Laurel Oil & Gas Co. v. Morrison et al. (not in Ind. T. reports); 212 U. S. 291, 29 Sup. Ct. Rep. 395.

THE
SUPREME COURT

STATE OF OKLAHOMA

SEPTEMBER TERM, 1918

PRESENT:

SAMUEL W. HAYES, CHIEF JUSTICE.
MATTHEW J. KANE, VICE CHIEF JUSTICE.
R. L. WILLIAMS,
JOHN B. TURNER, } JUSTICES.
R. H. LOOFBOURROW, }

HOLLOWAY v. McCORMICK *et al.*

No. 3261. Opinion Filed November 25, 1913.

(136 Pac. 1111.)

1. **DESCENT AND DISTRIBUTION — Right to Inherit — Uxoricide.** The power to declare the rule for the descent of property is vested in the Legislature; and where it has provided in plain and peremptory language that a husband shall inherit from his deceased wife, and no exception is made on account of criminal conduct, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife.
2. **BASTARDS — Acknowledgment of Paternity — Sufficiency.** A writing, to constitute an acknowledgment of paternity within the meaning of section 8420, Rev. Laws 1910, must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged.

Holloway v. McCormick et al.

3. **SAME.** This statute prescribes the kind of evidence necessary to establish the right of heirship to the father by his illegitimate offspring. The writing introduced in evidence, examined and held to be insufficient, as an acknowledgment, to fulfill the requirements of that portion of section 8420, Rev. Laws 1910, which reads as follows: "Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child."

(Syllabus by Galbraith, C.)

*Error from District Court, Okfuskee County;
John Caruthers, Judge.*

Action by Joe McCormick against Robert Holloway, a minor, and another for partition of land. From the judgment defendant Holloway brings error, and plaintiff files a cross-petition in error. Reversed and remanded.

Burford & Burford, for plaintiff in error.

J. B. Patterson and *C. B. Conner*, for Joe McCormick.

T. H. Wren, guardian *ad litem*, for defendant in error Luther McCormick.

Opinion by GALBRAITH, C. This was an action in partition, commenced by Joe McCormick in the district court of Okfuskee county, against Robert Holloway, a minor, claiming that plaintiff and defendant were each the owners of an undivided one-half interest in an allotment of land located in said county, which had been allotted to Lucinda McCormick, a freedwoman, who died in said county, intestate, on August 5, 1909, and praying for a partition of the land between said owners. The defendant answered by his guardian, admitting that he was a minor under nineteen years of age, and also that Lucinda McCormick died intestate, in Okfuskee county, Okla., on August 5, 1909, seised and possessed of an allotment of land, describing it, and he admitted also that he was the sole and only surviving brother of Lucinda McCormick, deceased, and specifically denied the other allegations of the petition. For further answer the defendant alleged that Lucinda McCormick died intestate, as aforesaid, and was the owner in fee and possessed of an allotment of land, and

Opinion of the Court.

also that she left no father or mother or issue of her body, and left no brother or sister, except the defendant, and that the defendant was the only surviving relative of the deceased; that at the time of her death Lucinda McCormick was married to one Leonard McCormick, who was her lawful husband, and also that Leonard McCormick died on the same day as Lucinda McCormick, but denied that Leonard survived Lucinda, and alleged that the husband was survived by the wife, and that Leonard McCormick never became seised of any interest in her real estate, and that the plaintiff, Joe McCormick, who was the father of Leonard McCormick, did not inherit any part of said allotment, through his deceased son; and also setting out that one Luther McCormick, the infant son of Daisy Hamm, an illegitimate son of Leonard McCormick, deceased, claimed an interest in said real estate, and claimed to be an heir of his father, and asked that Luther McCormick be made a party to said action, and required to set up whatever claim or interest he might have in said lands, and further set out that on the 5th day of August, 1909, the said Leonard McCormick, deceased, willfully and feloniously murdered his wife, Lucinda McCormick, and on the same day committed suicide; that, even if the said Leonard McCormick did survive his wife, both he and those claiming through him thereby became incapable of enjoying any of the property of the said Lucinda McCormick, because of the murder aforesaid.

By proper proceeding Luther McCormick was made a party defendant in said action; and a guardian *ad litem* appointed for him, and an answer was duly filed, setting out that his father, Leonard McCormick, had in writing, and in the presence of a competent witness, duly acknowledged him as his son, and that he therefore inherited one-half of the allotment of Lucinda McCormick, deceased, or the part that his father inherited.

The new matter set out in the answers of the defendants was denied by reply. On the issues thus made the cause was submitted to the court for trial. The court found:

“That on the 5th day of August, 1909, Leonard McCormick purposely shot and killed his wife, Lucinda McCormick; that said Lucinda McCormick died intestate on said date, without

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issue, leaving surviving her her husband, Leonard McCormick, and her brother, Robert Holloway, as her sole and only heirs at law; that said Lucinda McCormick, at the time of her death, was seised in fee simple of the following described lands, which said lands had been allotted to her in her own right as a freed-woman of the Creek Nation of Indians, to wit, the S. W. $\frac{1}{4}$ of section 20, township 12 N., range 8 E. and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 30, township 12 N., range 8 E. of the Indian Meridian, situate in Okfuskee county, Okla.; and that upon her death the said Robert Holloway and the said Leonard McCormick each inherited an undivided one-half interest in and to the said lands of which the said Lucinda McCormick died seised as above described. The court further finds that on the said 5th day of August, 1909, the said Leonard McCormick, immediately after taking the life of his wife, Lucinda McCormick, took his own life, then and there dying intestate, leaving surviving him his father, Joe McCormick, and his illegitimate son, Luther McCormick; that the mother of said Leonard McCormick died before the date on which said Leonard McCormick died; and that he left no issue surviving him other than said illegitimate child, Luther McCormick. The court further finds that on the 5th day of July, 1909, the said Leonard McCormick acknowledged in writing, signed in the presence of a competent witness, that he was the father of said Luther McCormick, and that, by reason of said acknowledgment of said Leonard McCormick, the said Luther McCormick became the heir at law of the said Leonard McCormick, and, as such, inherited from said Leonard McCormick an undivided one-half interest in and to the lands above described."

The court accordingly decreed that the plaintiff, Joe McCormick, take nothing by his suit, and that the defendants, Robert Holloway and Luther McCormick, were the joint owners of the land hereinabove described, and that each was the owner of an undivided one-half interest and entitled to share equally thereunder, and appointed three commissioners to make partition of the lands between the defendants. The defendant, Robert Holloway, excepted to that part of the decree giving Luther McCormick a one-half interest in the allotment, and perfected an appeal to his court. Joe McCormick excepted to the entire decree, and also perfected an appeal to this court, filing a cross-petition in error.

Opinion of the Court.

It is contended by the plaintiff in error that a murderer cannot acquire title to property by his crime and hold it, nor can any one claiming under him; that although the legal title to one-half of the allotment of Lucinda McCormick passed, upon her death, to her husband, equity will treat him and those claiming under him as constructive trustees of the title, because of the unconscionable mode of its acquisition, and compel them to convey to the heirs of the deceased ~~exclusive~~ of the murderer. This contention is urged upon the court by ingenious argument, and finds some support in authority. However, none of the cases are exactly in point with the case at bar; they being cases construing a will, or those which concern the proceeds of insurance policies on the life of the murdered person, where the claimant was an active participant causing the death of the testator or insured. The statute of descent in force in 1909, at the time of the death of the allottee and her husband, provides (section 8984, Comp. Laws 1909, Rev. Laws 1910, sec. 8417):

"The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court, and to the possession of any administrator appointed by that court for the purpose of administration."

Section 8985, *Id.* (Rev. Laws 1910, sec. 8418), also provides:

"When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends to and must be distributed in the following manner."

It will be observed that the statute is general in its terms and makes no exception. The Supreme Court of Kansas said, in reply to a similar contention to that made by the plaintiff in error:

"Although a theory cutting a murderer out of any benefit resulting from his crime appeals to the court's sense of justice, it cannot be overlooked that the Legislature has the power to declare a rule of descents; it has done so in language that is plain and peremptory, and no rule of interpretation would justify the court in reading into the statute an exception or clause dis-inheriting those guilty of crime." (*McAllister v. Fair*, 72 Kan. 540, 541, 84 Pac. 112, 115, 3 L. R. A. [N. S.] 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973.)

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Chief Justice Johnson, speaking for the Supreme Court of Kansas in the case from which the above excerpt was taken, answers the argument of the plaintiff in error, advanced in support of his theory, so fully that we feel justified in making the following quotation from that opinion:

"It is conceded that the statute is general and inclusive in its terms, but it is said to be inconceivable that the Legislature intended to give an estate to a husband who murdered his wife to obtain it. It is argued that the letter of a statute should not prevail over its sense and spirit, and that a literal interpretation of the statute in question would in effect be giving property as a reward for crime. It is said that the Legislature is presumed to have enacted the statute in question having in view the maxim of the common law that no man shall take advantage of his own wrong, or acquire property by his own crime, or use the law to accomplish his unlawful purposes, and therefore that the courts are justified in imputing a different intention to the Legislature and excepting murderers from the operation of the statute. These considerations would have great weight if there were ambiguity in the statute, or if it were the province of the court to settle the policy of the state with respect to the descent of property or as to the character and extent of punishment which should be inflicted for the commission of crime. That any one should be given property as the result of his crime is abhorrent to the mind of every right-thinking person, and is a strong reason why the lawmakers, in fixing the rules of inheritance and prescribing punishment for felonious homicide, should provide that no person shall inherit property from one whose life he has feloniously taken. A statute of this character has been enacted in at least one state. Iowa Code 1897, sec. 3386; *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151 [2 Ann. Cas. 657]. The horror and repulsion caused by such an atrocity, however, do not warrant the court in reading into a plain statutory provision an exception which the statute itself in no way suggests. If the statute were of doubtful meaning and open to two constructions, there might be room to infer that the Legislature intended the one which would be most reasonable and just in its application. As will be observed, however, the rule of inheritance is explicit, and the statute contains no hint that any one is to be excluded on account of misconduct or crime. In *Ayers v. Com'rs of Trego Co.*, 37 Kan. 240, 15 Pac. 229, the court was asked to read into a statute a meaning which its words did not import, and the reply was

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made: 'We have not the right to change the statute where it is clear and free from ambiguity, by any judicial interpretation.'"
(*McAllister v. Fair, supra.*)

It does not appear from the record that the husband, Leonard McCormick, murdered his wife for the purpose of securing her property. It does not appear that the desire to possess her property was in his mind or in any way induced the crime. It will be observed that the statute of descent makes nearness of relationship to the decedent, and not the character or conduct of the heir, the controlling factor as to the right of inheritance. The Criminal Code provides penalties for homicides and other crimes, and the loss of inheritable quality or the forfeiture of an estate is not among the penalties prescribed in the code. If we should hold that the loss of heirship and the forfeiture of an estate were a consequence of McCormick's crime, we would be compelled to ignore the legislative rule governing the descent of property, and would, in effect, impose a punishment for his crime in addition to that prescribed by the only body authorized to declare penalties for violations of law. Again, such construction of the statute is expressly forbidden by the Constitution of the state, which provides that "no conviction shall work a corruption of blood or forfeiture of estate." Article 2, sec. 15, Williams' Ann. Const. Okla. We cannot so hold.

Another reason why we could not hold that Leonard McCormick's crime in murdering his wife deprived him of the right to inherit property from her and denied the claim of his heirs to such property after his death, is that this court is committed to the contrary doctrine. In *de Graffenreid et al. v. Iowa Land & Trust Co.*, 20 Okla. 728, 95 Pac. 640, Mr. Justice Turner, speaking for the court, said:

"But if it were true that he murdered her for the purpose of at once getting possession of her property by inheritance, we do not think that would disqualify him from inheriting. 14 Cyc. p. 61, says: 'By the weight of authority, in the absence of express provisions excluding from inheritance an heir murdering the intestate, the operation of the statute of descent is not affected by the fact that the ancestor was murdered by the heir apparent in order to obtain the inheritance at once, and therefore an heir who murders his ancestor in order that he may inherit the estate at once is not disqualified from taking.' (And

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authorities cited.) That being the rule, when the killing is done for the purpose of inheriting, it follows, *a fortiori*, that the same should be the rule when no such intention appears, and therefore we hold that Ben Reeves, because of the fact that he murdered his wife, Castella Brown, is not disqualified from inheriting from her under the Creek law of descent and distribution, and therefore the plaintiff in error, de Graffenreid, took, by his conveyance set forth in this cause, his entire interest in the allotment of said Castella Brown."

We conclude that the plaintiff in error obtained by the decree of the court below all he was entitled to, namely an undivided one-half interest in the estate of his deceased sister, Lucinda McCormick, and that his assignment of error must be overruled.

The questions presented by the cross-petition in error of Joe McCormick challenge the correctness of the finding and conclusion of the trial court that the deceased, Leonard McCormick, had made an acknowledgment in writing, in the presence of a competent witness, that he was the father of the defendant, Luther McCormick, and therefore constituted him his heir. It is contended that there is no evidence to sustain this finding of the court. The statute (Rev. Laws 1910, sec. 8420) reads:

"Every illegitimate child is an heir of the person, who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child."

At common law the illegitimate child had no inheritable blood. 2 Blackstone, 247. This statute is remedial in its nature and purpose. It confers upon this class of unfortunates equal rights of inheritance with legal heirs and prescribes the kind of evidence necessary to establish the right of *nullius filii* to the heirship of the father. The right can only be established by the kind of evidence required by the statute. There must be an acknowledgment of paternity by the father made in writing and in the presence of a competent witness. The writing need not necessarily be made for this particular purpose, but an acknowledgment of paternity must be certain, clear, and unambiguous. In other words, the writing must be complete within itself, at least so far as the acknowledgment of paternity is concerned, and must not require aid from extraneous evidence as to this fact. *Lind v. Burke*, 56 Neb. 785, 77 N. W. 444; *Thomas v. Thomas*,

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64 Neb. 581, 90 N. W. 630; *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 959; *Moore v. Flack*, 77 Neb. 52, 108 N. W. 143; *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40.

The writing relied upon by the defendant in error, and which the trial court held to be sufficient acknowledgment within the meaning of the statute, reads as follows:

"Boley, Okla., July 5, 1909. Mrs. Daisy Hamm—Dear Friend: I will be over to Sapulpa some time this month to see you and Luther. Take good care of my boy. I will bring him some clothes when I come. I would send you some money today but I am all in. Uncle Lige Walker the man that come with me over there is very low. D. M. kept your letter a week before he gave it to me. Kiss Luther for me from your old love. Leonard McCormick."

The evidence shows that this writing was a letter produced at the trial by the mother of Luther McCormick, who testified that she received it by due course of mail while living at Sapulpa, Okla. She also testified that the signature to the letter was that of Leonard McCormick. The party who wrote the letter testified that he wrote the same at the request of Leonard McCormick, who dictated the contents of the letter to him, and when the same had been written that Leonard McCormick, with his own hand, signed his name thereto. If the letter had been written by Leonard McCormick himself, and mailed as it was, there can be no question that it would not have been a sufficient acknowledgment within the terms of this statute. Thus the question arises: Can the accident that a third party wrote the body of the letter at the request of Leonard McCormick make it sufficient evidence of acknowledgment of paternity? The statute of Nebraska is practically the same as section 8420, above quoted. The Supreme Court of Nebraska say, in construing this statute, in *Lind v. Burke et al.*, *supra*:

"We are satisfied that a writing, to fulfill the requirements of the law which we have quoted, must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged. Whether it should go further than this, we have before stated, we need and do not now decide; but so much it must voice, to be of force, in the light of this view of the requisites of the evidence."

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Also, further on in that opinion, the court said:

"It must not be forgotten, in this examination, that it is not because the person can be shown to be the offspring, or is in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be, in and of itself, sufficient, unaided by extrinsic evidence, to establish the paternity."

The Nebraska court, in the latest case of *Thomas v. Thomas*, 64 Neb. 590, 90 N. W. 634, said:

"No intention or desire that the child should become an heir, seems needed if his father is pointed out by an acknowledgment of the paternity in the latter's own hand, signed in the presence of a competent witness. Neither does it seem that the court should add to this statute any requirement of delivery of this evidence, or that it be expressly mentioned that the child is illegitimate, or that the witness attest the writing. The statute might require all this, but by its terms does not."

In *Moore v. Flack*, *supra*, the facts are very similar to those in the instant case. The writing relied upon to constitute the acknowledgment was a letter written by the father to the mother, and the particular language used was "take good care of our boy and call him Thomas Moore, and I will give him a good start some day." The court held that this writing was "clearly insufficient" to constitute an acknowledgment of paternity within the statute.

The state of Minnesota also has a statute almost identical with that above quoted. In *Pederson v. Christofferson*, *supra*, the instrument relied upon as constituting the acknowledgment was a lease, and the language used was:

"The said Hans Pederson hereby acknowledges that he is the father to the said Mari Hansdatter (Ronning)."

In discussing the statute, the court said, in part:

"This statute was not intended for the benefit or relief of fathers of illegitimate children; but it was intended for the benefit and protection of such children and to mitigate in some measure the vicarious punishment imposed by the common law upon them for the sins of their fathers. It must, then, be liberally construed. It does not require the acknowledgment of fatherhood to be in any particular form, or that it should be made with any particular intent. The essential thing is the acknowledgment, the

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proof of which must be in writing, signed as the statute requires, which is silent as to the character or purpose of the instrument in which the acknowledgment is found. We cannot read into the statute by construction such omissions. The proof of the father's admission or acknowledgment must, however, be in writing, signed by him, in the presence of a competent witness, and it must by its terms clearly and specifically acknowledge the person therein named to be the child of the party signing the writing. This is necessary to avoid spurious claims of heirship. The decisions of other courts construing similar statutes are conflicting as to the form and character of the instrument of acknowledgment. This is a new question in this state, and we hold, upon principle and what seems to be the weight of judicial authority, that the statute does not require that the instrument, acknowledging the paternity of the child, must be made for the express purpose and in a separate instrument, but that it is a sufficient compliance with the statute if it be made in any written instrument, collateral or otherwise, signed by the party, in the presence of a competent witness, in which he clearly and specifically acknowledges that he is the father of the child. *Blythe v. Ayers*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385; *Rohrer v. Muller*, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350; *Remy v. Municipality*, 11 La. Ann. 118; *Brown v. Iowa Legion of Honor*, 107 Iowa, 439, 78 N. W. 73. Exhibit B contains a clear and specific acknowledgment by Hans Pederson that he was the father of the contestant."

Under the rule announced in the above cases, the writing relied upon to constitute the acknowledgment of the paternity of Luther McCormick is clearly insufficient.

"I will be over to Sapulpa some time this month to see you and Luther. Take good care of my boy. I will bring some clothes when I come. I would send you some money today but I am all in. * * * Kiss Luther for me from your old love."

The court cannot take this writing by its four corners and say it "directly, unequivocally, and unquestionably" acknowledges that Leonard McCormick is the father of Luther McCormick. Extrinsic evidence is necessary to show that the indefinite, ambiguous, and uncertain phrase, "my boy," used therein, even refers to Luther McCormick. This writing being the only evidence of the acknowledgment of paternity permitted by the statute, and it being insufficient, it follows that there was no evidence to sus-

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tain the finding of the trial court that Luther McCormick was the heir of Leonard McCormick and entitled to an undivided one-half interest in the allotment of Lucinda McCormick, and that the exception of the cross-petitioner, Joe McCormick, to such finding must be sustained.

We conclude that the part of the decree finding that Luther McCormick inherited an undivided one-half interest in the lands of which Lucinda McCormick died seised must be vacated, and the cause remanded, with directions to enter a decree that Joe McCormick, the father, inherited from his son, Leonard McCormick, an undivided one-half interest in said estate, and for further proceeding not inconsistent with the foregoing views.

By the Court: It is so ordered.

GILMER v. SCHOOL DIST. NO. 26, NOBLE COUNTY.

No. 3276. Opinion Filed November 25, 1913.

(136 Pac. 1086.)

EVIDENCE—Minutes of Annual School Meeting—Parol Evidence. Where a motion was made and carried at an annual school meeting, authorizing the district school officials to sell some piles of second-hand lumber, it is competent to show such action of the assembled voters by parol evidence, where the minutes fail to make any mention of the same, and where such minutes show on their face that they are a mere abstract or synopsis of what occurred at the meeting.

(Syllabus by Brewer, C.)

*Error from County Court, Noble County;
L. B. Robinson, Judge.*

Action by School District No. 26, Noble County, Oklahoma, against L. A. Gilmer. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry S. Johnston, for plaintiff in error.

H. E. St. Clair, for defendant in error.

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Opinion by BREWER, C. The defendant in error sued L. A. Gilmer in a justice of the peace court to recover \$13.25 for second-hand lumber alleged to have been sold to him by the district at public auction. It appears that a windstorm wrecked a wooden school building so that it had to be torn down and a new one built, and the lumber in suit is a portion of the wreckage which was not used in the new building and which with other lumber of like character was sold by the district at a public auction on the school ground pursuant to proper advertisement. The case was tried in the county court without a jury, and judgment for the amount claimed was awarded against defendant Gilmer, who brings this appeal and relies on two propositions: First, that it was not shown that the school district officials were authorized to sell the property by the voters of the district. Second, that if there was authority to sell, the sale was illegal because defendant was a member of the school board.

1. The court found, and there is no doubt in our minds from reading the record, that the voters of this district assembled at the annual school meeting did authorize the district officials to wreck the old building and to use such of the old material as was practicable in the new one, and to dispose of the remainder; however, the minutes of the annual meeting are silent as to the disposition to be made of the old lumber. The minutes show that the schoolhouse was to be torn down and the old lumber piled up, and that a new house was to be built at the place. The court permitted a witness to testify that, on motion duly seconded at the school meeting, it was declared that the old lumber should be used in the new building so far as practicable, and that such as could not be used should be sold. The chairman of the meeting and others corroborated this evidence. So the point is this: Is it competent to show by parol that a certain affirmative action was taken by the assembled voters, of which no minute was made by the clerk? It is not sought to contradict any of the record that was made, but merely to show that an action was taken which the clerk failed to make any mention of at all. The minute made by the clerk appears on its face to be a mere brief abstract of what the clerk conceived to be the substance of the various

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things done at the meeting. Nothing like a report in full of the proceedings is attempted. The clerk on the stand stated that he merely tried to get down the substance of motions and the actions of the meeting as he understood them. In the case of *Rock Creek Township v. Codding*, 42 Kan. 649, 22 Pac. 741, which seems to have been a very similar case to the one at bar, the syllabus reads:

"Where only a brief abstract of the proceedings of a township board is entered of record, and the question arises as to what the action of the board was, parol evidence is competent to supplement the record, and to show all its acts and proceedings."

And in the body of the opinion, after discussing the matter somewhat, it is said:

"We think it was competent to show by parol evidence the resolution which was adopted and also to show who was directed to purchase the material for the bridges. Neither the statute quoted nor any other renders any act or proceeding of the board void because it is not recorded, nor makes the record of the board the only evidence of their actions"

—citing *Gillett v. Com'rs of Lyon Co.*, 18 Kan. 410; *Railroad Co. v. Tontz*, 29 Kan. 460; *Railroad Co. v. Com'rs of Stafford Co.*, 36 Kan. 121, 12 Pac. 593; *State ex rel. v. Com'rs of Pratt Co.*, 42 Kan. 641, 22 Pac. 722. The same may be said of the statute in the instant case: section 8087, Comp. Laws 1909 (Rev. Laws 1910, sec. 7800), which provides that the clerk, if present, and if not any voter who may be selected, shall certify the proceedings of the district meeting, is no broader than the Kansas statute mentioned.

We believe, under the circumstances of this case, it was competent to show that the action claimed was in fact taken, and that the clerk of the meeting failed to notice same in his minutes. These memoranda of the proceedings of an annual school meeting, which are to be made by the clerk of the district, if present, and if not by any other voter chosen by those assembled, cannot and ought not to have the same force and conclusive effect as court records, written agreements, etc., and while it is not permissible to contradict the record made, and if on its face it purports to be an accurate, full report of the proceedings,

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it probably could not be explained by parol evidence, yet where on its face it is merely a crude abstract or synopsis of what transpired, we see no objection in permitting it to be clearly shown by parol that a thing was done and no mention made of it. As said in the case above, while it requires the authority of the voters for the performance of certain things, by the school officials, yet there is nothing in the law that requires the authority to be found in a record of the proceedings. It is the assent of the voters, properly expressed, that constitutes the authority. If it can be clearly shown that such authority was in fact conferred, and the clerk merely overlooked, or deemed it unimportant to mention the same, it seems, especially where the parties have acted upon such authority in good faith, that the mere omission of the clerk should not be allowed to render the action illegal.

The following authorities are more or less in point: *School Dist. No. 2 v. Clark*, 90 Mich. 435, 51 N. W. 529; *Indianapolis v. Imberry*, 17 Ind. 175; *School Dist. v. Atherton*, 12 Metc. (Mass.) 113; *Morgan v. Wilfley et al.*, 71 Iowa, 212, 32 N. W. 265; *Electric Co. v. Bd. Com'rs*, 81 Kan. 8, 105 Pac. 453; *Austin v. Allen*, 6 Wis. 134; Beach on Pub. Corp. vol. 2, sec. 1298.

2. On the second point, we deem it sufficient to say that the evidence to our minds fails to show that the defendant was a member of the school board at the time he bought the lumber. The defendant on the stand, when asked if he was present at the annual school meeting, replied that he was not; that if he had been there he would have presided, as at that time he was director. This is the only evidence tending to show that he was a member of the board, some months later, when he bought the lumber. Besides, it would seem that the defendant, having bought the lumber and carried it off, was estopped, when sued for its value, from asserting that it was illegal for him to become a purchaser. *Shawnee Nat. Bank v. Purcell Whole. Gro. Co.*, 34 Okla. 31, 124 Pac. 603, 41 L. R. A. (N. S.) 494; *Fremont County v. Warner*, 7 Idaho, 367, 63 Pac. 106; *Marshall v. Murphy*, 5 Kan. App. 718, 46 Pac. 973; *McKinnis v. Scottish Amer. Mtg. Co.*, 55 Kan. 259, 39 Pac. 1018.

The cause should be affirmed.

By the Court: It is so ordered.

Levy v. Yarbrough et al.

LEVY v. YARBROUGH *et al.*

No. 3279. Opinion Filed November 25, 1913.

(136 Pac. 1120.)

1. **BROKERS—Authority of Broker—Contract of Sale.** The mere listing of real estate with a broker for the purpose of procuring a purchaser thereof acceptable to the owner does not constitute authority in such broker to bind the owner by an executory contract of sale.
2. **SAME.** Before a real estate broker can bind the owner by an executory contract of sale, he must have specific authority so to do from the owner.
3. **FRAUDS, STATUTE OF—Parol Agreement—Right to Enforce.** A parol agreement for the sale of lands will be enforced by the courts where the vendee has paid the purchase price, and taken possession, in good faith, of the premises with the knowledge and consent of the owner, and has made permanent improvements thereon.
 - (a) But the mere acceptance of the purchase price under an oral contract is not of itself sufficient to take the sale out of the statute of frauds.
 - (b) Nor will the fact that the owner orders an abstract of the property to be made take such case out of the statute.

(Syllabus by Brewer, C.)

*Error from Superior Court, Oklahoma County;
Edward D. Oldfield, Judge.*

Action by I. B. Levy against R. S. Yarbrough and others. Judgment for defendants, and plaintiff brings error. Affirmed.

G. A. Paul, for plaintiff in error.

John H. Wright and *Clarence J. Blinn*, for defendants in error.

Opinion by BREWER, C. This suit is in the alternative for either a specific performance of a contract for the sale of certain lots, or for damages for failure to comply with such contract. The plaintiff in error, who was plaintiff in the trial court, and will be hereafter so designated, claims that he made a contract with a real estate firm for the purchase of certain lots upon

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certain terms, and that such contract was binding upon the defendants, and that it was their duty under the law to fulfill the same by a conveyance of the property. Plaintiff's first petition, filed June 15, 1909, asserted that the authority from the defendants to the real estate agents to sell the property was verbal. A demurrer was sustained. An amended petition filed July 24, 1909, did not materially change the averments of the first one, and, being attacked by demurrer, met the same fate. The second amended petition, filed March 15, 1910, alleged that the defendants had authorized the real estate firm in writing to sell the land, but that defendants "neglected and forgot to place their signatures to * * * written agreement," etc. This petition was held insufficient, and on February 21, 1911, the plaintiff filed what he terms a supplemental petition, and this one was also held on May 13, 1911, to be insufficient as against a demurrer. The plaintiff, refusing to plead further, brings the case here; the sole point involved being the sufficiency of the allegations of the plea to support the action.

The petition involved here avers, in substance, merely that the defendants listed their property with the real estate agents by a personal application therefor, and stood by and saw the agents write out a listing card, upon which the agents placed their names, the property to be sold, and the amount of price wanted, and that this constituted an authority in writing in the real estate agents, and that thereafter the plaintiff made a written offer to buy the property from said agents, describing it, together with the consideration and the terms of payment, and that the said agents accepted said offer and signed the same at the bottom thereof. In describing the authority of the agents under the listing aforesaid, the plaintiff says:

"That on and before the said 5th day of June, 1909, the said defendants, being desirous of selling said real estate, listed the same with one G. B. Stone Realty Co., of Oklahoma City, Okla., for the purpose of procuring a purchaser therefor, and by such listing the said defendants directed and authorized the said Stone Realty Company to act in the capacity of agent for the sale of said real estate at the price of \$7,875, upon such terms as suited the defendants."

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The plaintiff further alleged a ratification by the defendants of the contract of sale made with the agents. Without discussing in detail the allegation that the authority given the agents was in writing, we think it sufficient to say that the authority of the agents as alleged, even had it been in writing, was not sufficient authority in the agents to make for the defendants a binding contract of sale of the lots. The giving of an agent the authority to handle real estate, and to procure a purchaser for the same, falls far short, in our judgment, of authorizing such agent to make a binding contract of sale himself.

It will be observed that the averment says: That defendants listed the lots with the agent "*for the purpose of procuring a purchaser therefor*" to act as agent for defendants in the sale of the lots "*upon such terms as suited the defendants.*" In our judgment the allegations of the petition show no authority in the agent further than to procure a purchaser acceptable to the owners.

This question was before the territorial Supreme Court in case of *Gault Lumber Co. v. Pyles et al.*, 19 Okla. 415, 92 Pac. 175, and in the body of the opinion, written for the court by Chief Justice Burford, it is said:

"Nor do we think there was shown such a written authority of the agent to sell as will take the case out of the statute of frauds. An authority of an agent to sell real estate, in order to bind the owner by executory contract, must be specific and certain as to terms and description. Ordinarily, when property is placed in the hands of an agent to sell, the authority conferred is only held to be the authority to find a purchaser at a given price and submit the same to the owner, and not an authority to sell and bind the owner."

And in the case of *Weatherhead v. Eittinger*, 78 Ohio St. 104, 84 N. E. 598, 17 L. R. A. (N. S.) 210, it is said by the Supreme Court of Ohio:

"A real estate broker is without authority to execute a contract of sale which shall be binding upon one who places real estate in his hands for sale unless such authority is specially conferred."

This Ohio case is reported in 17 L. R. A. (N. S.) 210, and the editor has appended thereto a very valuable note, practically

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covering this question, and in which a great number of authorities are collected sustaining the text. See, also, *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Foss Inv. Co. v. Ater*, 49 Wash. 446, 95 Pac. 1017; *Hardinger v. Columbia*, 50 Wash. 405, 97 Pac. 445; *Hutchins v. Wertheimer*, 51 Wash. 539, 99 Pac. 577; *Lawson v. King*, 56 Wash. 15, 104 Pac. 1118.

2. The petition does not aver facts sufficient to constitute a ratification so as to take the case out of the statute of frauds. It is averred that defendants accepted the earnest money; that they orally agreed to the unauthorized sale made by the agents; that they procured an abstract of the title to be brought down to date, etc. The courts will enforce a parol agreement for the sale of lands, where the vendee has paid the purchase price, and taken possession, in good faith, of the premises, with the knowledge and consent of the owner, and has made permanent improvements thereon. *Harris et ux. v. Arthur*, 36 Okla. 33, 127 Pac. 695; *Sutherland v. Taintor*, 17 Okla. 427, 87 Pac. 900. But the mere acceptance of the purchase price is not of itself sufficient. *Hallsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; *Rowe v. Henderson*, 4 Ind. T. 597, 76 S. W. 250; *Givens v. Culder*, 2 Desaus. (S. C.) 172, 2 Am. Dec. 686; *Cooper v. Thomason*, 30 Ore. 161, 45 Pac. 296; *Goddard v. Donaha*, 42 Kan. 754, 22 Pac. 708; 20 Cyc. 297, and note 23.

Our statute of frauds, as indeed is the statute of most of the states, is substantially the same as that of England, and, while the English chancery courts, at an early period, created many exceptions to the statute, some of which have been followed by the American courts, yet these exceptional cases, taken out of the operation of the statute, are usually based on facts which show that the party invoking the statute, designed to prevent frauds, is in fact using the same to perpetrate one.

The Alabama Supreme Court, speaking through Justice Taylor (*Allen v. Booker*, 2 Stew. 21, 19 Am. Dec. 34), discusses this subject, and quotes from the great Chief Justice Marshall as follows:

J. W. Ripy & Son v. Art Wall Paper Mills.

"In the United States, the cases uniformly show that the courts are rather inclined to restrict than to enlarge the cases of exception to the strict execution of the statute. In the case of *Grant v. Naylor*, 4 Cranch, 235, that distinguished judge, Chief Justice Marshall, observes: 'Already have so many cases been taken out of the statute of frauds which seem to be within its letter that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and the court entirely concurs in that opinion.'"

Nor are the facts that the owners ordered the abstract brought down to date, and made oral statements that they would make the sale, sufficient to ratify an unenforceable contract in regard to the sale of lands. *Harris et ux. v. Arthur*, 36 Okla. 33, 127 Pac. 695; *Givens v. Calder*, 2 Desaus. (S. C.) 172, 2 Am. Dec. 686; *Parrish v. Koons*, 1 Pars. Eq. Cas. (Pa.) 78; *Hutchins v. Wertheimer*, 51 Wash. 539, 99 Pac. 577; *Cooper v. Thomason*, 30 Ore. 161, 45 Pac. 296; *Halsell v. Renfrow*, *supra*; *Kesner v. Miesch*, 204 Ill. 320, 68 N. E. 405; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Roth v. Goerger et al.*, 118 Mo. 556, 24 S. W. 176.

The case should be affirmed.

By the Court: It is so ordered.

J. W. RIPPY & SON v. ART WALL PAPER MILLS.

No. 3281. Opinion Filed November 25, 1913.

(136 Pac. 1080.)

1. **CONTRACTS—Restraint of Trade.** An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.

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2. **SAME.** A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operating might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce.
3. **SALES—Action for Price—Burden of Proof.** In a suit for a balance due for goods under the terms of a written contract, where the answer admits the execution of the contract and the receipt of the goods at the price claimed, and defends on the grounds that the contract is illegal and unenforceable, and was procured through fraud, the burden of proof is on the defendant.
4. **SAME—Written Contract—Merger of Oral Negotiations.** All prior and contemporaneous oral negotiations are merged into a written contract finally entered into, and which fully covers the subject-matter of such negotiations.

(Syllabus by Brewer, C.)

Error from District Court, Oklahoma County;

W. R. Taylor, Judge.

Action by the Art Wall Paper Mills against J. W. Ripy & Son. Judgment for plaintiff, and defendants bring error. Affirmed.

M. Fulton, for plaintiffs in error.

E. G. McAdams, for defendant in error.

Opinion by BREWER, C. The Art Wall Paper Mills, a corporation of Dallas, Tex., brought this suit in the district court against J. W. Ripy & Son, a copartnership, to recover the purchase price of certain goods, wares, and merchandise, sold and delivered in pursuance of a certain written contract executed by the parties. We will hereafter refer to the parties as they were called in the trial court. The case was tried to a jury, and a verdict returned in favor of the plaintiff. The defendants, plaintiffs in error here, bring up the case on case-made, and in their brief seem to rely upon the following alleged errors: First. Overruling defendants' demurrer to the petition. Second. Placing the burden of proof upon the defendants. Third. The exclusion of evidence offered by defendants.

1. The defendants claim that plaintiff's petition is demurrable for the reason that the suit is based upon a certain written

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contract or trade agreement attached to and made a part of the petition, and which it is alleged shows upon its face that it is an agreement in restraint of trade and commerce, and is therefore void; and, that being void, the plaintiff cannot recover for the goods sold and delivered in pursuance of its terms. The portion of the agreement which it is claimed has the above effect is a provision inserted in it requiring the defendants to handle only the wall papers manufactured and kept for sale by plaintiff during the life of the contract, which was from April 5th to January 5th following. In other words, that the defendants agreed that from the limited period of time named in the contract they would buy all their wall papers from the plaintiff. We do not believe that this agreement has the effect contended for. It is not pointed out, and from a reading of the contract we do not believe it can be pointed out, wherein this contract has the effect of restraining trade, or competition in trade, so as to bring it within the denunciation of the law. The plaintiff is a wholesale dealer in wall paper, and had traveling salesmen in Oklahoma and Indian Territory at the time this contract was made in 1904. The defendants are retail dealers in Oklahoma City. In return for defendants' agreement that for a certain period of time they would buy their wall paper exclusively from plaintiff, and would keep in stock a complete line of the same, the reciprocal agreement was made by plaintiff that its traveling salesmen, in the two territories named, would send their "stock fill in orders" to be filled from defendants' stock, and for which sales they received the profits. If plaintiff was going to give defendants the benefit of certain sales made by its traveling salesmen from samples of its line of papers in stock, it certainly was not unreasonable to require defendants to carry, for the time being, only its line of papers. It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties, rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are

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not competitors, nor does the contract affect the competitors of defendants, nor can we see wherein it could injuriously affect the public. We think these views find ample support in the authorities.

An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade. *Threlkeld v. Steward*, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888; *Trentman v. Wahrenburg et al.*, 30 Ind. App. 304, 65 N. E. 1057; *Brown v. Rounsavell*, 78 Ill. 589; *Live Stock Ass'n v. Levy*, 54 N. Y. Super. Ct. 32; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Olmstead v. Distilling & C. F. Co.* (C. C.) 77 Fed. 265; *Arnold Bros. v. Kreutzer & Wasem.*, 67 Iowa, 214, 25 N. W. 138; *Kronschnabel-Smith Co. v. Kronschnabel*, 87 Minn. 230, 91 N. W. 892.

A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce. This view is fully sustained by the Supreme Court of the United States in various decisions.

In *Anderson et al. v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, it is said:

“Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its.

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purpose or object. As is said in *Smith v. Alabama*, 124 U. S. 465, 473, 8 Sup. Ct. 564, 31 L. Ed. 508, 510, 1 Interst. Com. R. 804: "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."

In *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, Judge Sanborn, after discussing contracts and agreements which would constitute a combination or conspiracy in restraint of trade, adds:

"If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who made and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation."

—and cites to support the statement the following authorities:

"*Hopkins v. U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. Chemical Co. v. Provident Chemical Co.* (C. C.) 64 Fed. 946; *California Steam Navigation Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Schwalm v. Holmes*, 49 Cal. 665; *In re Green* (C. C.) 52 Fed. 104, 115-117; *In re Grice* (C. C.) 79 Fed. 627, 644; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832; *State v. Goodwill* [33 W. Va. 179] 10 S. E. 285, 286, 6 L. R. A. 621, 25 Am. St. Rep. 863; *People v. Gillson*, 109 N. Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; *Butchers' Union Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 755, 4 Sup. Ct. 652.

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28 L. Ed. 585; *Welch v. Phelps & Bigelow Windmill Co.* [89 Tex. 653] 36 S. W. 71; *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427 [56 L. R. A. 709]; *Walsh v. Dwight* [40 App. Div. 513] 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589; Noyes on Intercorporate Relations, sec. 388, p. 563."

2. The court correctly placed the burden of proof upon the defendants. The plaintiff sued for a balance due for goods sold under a contract, setting out the contract and a complete verified statement of account, showing debits and credits and balance due. The defendants admitted the execution of the contract, the receipt of the goods, and also referred in the answer to the contract and invoices, but claimed an additional credit of a few dollars. The answer then averred matter tending to avoid liability for payment for the goods received, because of the alleged illegality of the contract and fraud in procuring the same. The plaintiff then in open court conceded the additional credits claimed, and remitted the same. This left the attack upon the validity of an admitted contract as the only issue. The defendants had the burden of proof upon them to sustain the issues thus tendered.

3. The evidence, which it is contended the court erred in refusing to admit, was intended to cover several different contentions. It is only referred to in the brief by general statements of counsel, in the main, and is not brought into the brief. We have gone into the record, however, and made some search, and find that the real complaint is in the rejection of oral evidence, clearly intended to either vary, modify, contradict, enlarge, or destroy the plain and unambiguous meaning of the written contract. For instance, evidence was offered and refused that during the prior and contemporaneous negotiations terminating in the written contract it was agreed that plaintiff would not sell its goods to any other dealer in Oklahoma and Indian Territory; there was no hint of such an agreement in the writing which the parties formally executed, and it very fully defined the rights and duties of both parties. The expressed purpose of the evidence was to so ingraft by oral evidence onto a written contract, legal and valid and in no sense immoral or against public policy, a new and foreign meaning so as to render the contract when so enlarged invalid as against public policy, to the end that the law

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would then strike down the contract when so enlarged, affording defendants a means of escape from liability. This evidence was properly rejected, and the same may be said of the rulings on the other rejected evidence.

The jury passed on the evidence, and its verdict was approved by the trial court. To our minds the verdict was right.

The cause should be affirmed.

By the Court: It is so ordered.

CRUMP *et al.* v. SADLER *et al.*

No. 3282. Opinion Filed November 25, 1913.

(136 Pac. 1102.)

1. **LANDLORD AND TENANT—Rent —When Payable.** Rent for use of agricultural lands, payable in a stipulated share of the crop grown thereon, is due and payable when the crop matures and is ready for harvesting or market.
2. **SAME—Instructions.** In the trial of an action for rent by a landlord against a tenant, it is error to instruct the jury that the tenant has "a reasonable time" to pay the rent after removal of part of the crop from the premises.
3. **SAME—Chattel Mortgages—Priority of Lien.** The statutory lien for rent given a landlord on crops grown on agricultural lands, by section 3806, Rev. Laws 1910, is superior to a mortgage lien given by a tenant to a third party on such crops, and may be enforced by attachment without regard to such mortgage.

(Syllabus by Galbraith, C.)

Error from County Court, Jefferson County;

B. T. Price, Judge.

Action by D. C. Crump and S. R. Garner against R. L. Sadler and W. R. Donagan for rent, and plaintiffs caused attachment to issue and the crops grown on the leased premises to be seized. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Harper & Dillard, for plaintiffs in error.

Bridges & Vertrees, for defendants in error.

Opinion of the Court.

Opinion by GALBRAITH, C. D. C. Crump was the assignee of a rental contract entered into on the 22d day of December, 1910, whereby 60 acres of land, being part of the N. E. $\frac{1}{4}$ of section 2, township 8 S., range 7 W., in Jefferson county, Okla., were "demised and leased" to the defendant in error R. L. Sadler, for one year from that date. This lease provided that the land should be planted in cotton and that the lessee should "pay as rent money one-fourth of all the cotton grown thereon." It further provided that "the land that is not in cultivation shall be cleared of brush and might be planted to melons or any other crops that Sadler might wish," making no provision for the payment of rent for any of the land, except that which was to be planted to cotton. This lease was assigned to D. C. Crump on the day of its execution. August 7, 1911, Crump brought an action in the justice court of Wray township, Jefferson county, against Sadler for the recovery of the sum of \$165, alleged to be due as rent under said lease, and at the same time caused an attachment to be issued and the crops grown on the leased premises to be seized thereunder. The result of the trial of the cause in the justice court was in favor of the plaintiff for full amount claimed and foreclosure of the attachment lien. An appeal was perfected to the county court, and when the cause was called for trial one W. R. Donagan, a mortgagee of Sadler's, was permitted by the court to file an interplea therein. Afterwards Donagan filed a motion to dissolve the attachment on the ground that he had a mortgage on the crops at the time the attachment was issued and served, and that the amount of his mortgage had not been paid to the county treasurer or tendered or offered to him prior to the levy of the attachment. This motion was sustained by the court and exception saved by the plaintiff. The trial in the county court resulted in a judgment for the defendants, and an appeal was perfected to this court by Crump and S. R. Garner, who was made a party plaintiff in the county court on account of his having purchased an interest in the lease assigned to Crump.

One of the errors assigned is the ruling of the trial court in dissolving the attachment. The theory upon which the court

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sustained this motion was that the interpleader had a mortgage on the property attached, and that the amount of the mortgage had not been paid to the county treasurer or a tender of the amount made to the mortgagee prior to the levy of the attachment, and on that account the attachment was void. This was error. The lease contract between Mrs. Hightower and Sadler clearly created the relation of landlord and tenant between the parties thereto, and, when Mrs. Hightower assigned her interest in this lease to Crump, the relation of landlord and tenant existed between Crump and Sadler. The statute (section 3806, Rev. Laws 1910) gave Crump, as landlord, a lien on the crops grown upon the leased premises for the year 1911. This statute reads as follows:

"Any rent due for farming land shall be a lien on the crop growing or made on the (leased) premises. Such lien may be enforced by action and attachment therein, as hereinafter provided."

Although the mortgage from Sadler to Donagan bore the same date as the lease, to wit, December 22, 1910, and apparently was intended to cover the crops to be grown upon the leased premises, however, Sadler could not defeat the landlord's lien on the crops by the execution of this mortgage. The landlord's lien was superior to the mortgage lien. *Turner v. Wilcox*, 32 Okla. 56, 121 Pac. 658, 40 L. R. A. (N. S.) 498; *Tootle-Wheeler Merc. Co. v. Floyd*, 28 Okla. 308, 114 Pac. 259; *Greeley v. Greeley*, 12 Okla. 659, 73 Pac. 295. Section 3809, Rev. Laws 1910, authorized the attachment to issue if the conditions prescribed therein existed at the time of the commencement of the suit before the justice of the peace. The statute reads:

"When any person who shall be liable to pay rent (whether the same be due or not, if it be due within one year thereafter, and whether the same be payable in money or other things) intends to remove, or is removing, or has, within thirty days, removed, his property, or his crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action, and upon making an affidavit stating the amount of rent for which such person is liable, and one or more

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of the above facts, and executing an undertaking as in other cases, an attachment shall issue in the same manner and with the like effect as is provided by law in other actions."

Complaint is also made of paragraph 6 of the court's instruction to the jury, wherein the court told the jury that if the defendant removed any part of the crop from the premises without the consent of the landlord, and did not pay the rent "within a reasonable time," then the landlord had the right to sue and attach the crops. This is not the law, and the giving of this instruction was error. When rent is payable in a share of the crop grown on the leased premises, it is due when the product is mature and ready for market. The statute does not give the defendant a reasonable time to pay the rent, but prescribes that, if he shall remove any part of the crop from the leased premises without the consent of the landlord, then the landlord has the right to sue out an attachment and seize the crop.

Complaint is also made of another instruction of the court wherein the jury were told that, if the plaintiff by attachment seized the crops grown upon the leased premises, and thereby took it out of the power of the defendant to pay the rent, the plaintiff cannot complain, and in that event they should find for the defendant. This is not the law, and the giving of this instruction was error.

It appears from the written lease that no rent was provided for the land that might be planted to melons or any other crop other than cotton, and it also appears from the evidence that Sadler and Crump made an agreement subsequent to the assignment of the lease whereby rent was agreed upon for land that should be planted to melons. The court should have instructed the jury, as a matter of law, that the relations of landlord and tenant existed between Crump and Sadler, and should have told them that if, at the time of the commencement of the suit and the issuance of the writ of attachment, Sadler had removed any part of the crops from the leased premises, without the consent of the landlord, and without paying the rent then due or to become due, and such removal had occurred within 30 days from the commencement of the suit, then the attachment should be

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sustained, and that judgment should be given for the plaintiff for the amount of the rent that might be found owing, and sustaining the attachment to that extent. The jury should have been further instructed that the mortgage lien of the interpleader was inferior and subject to the plaintiff's landlord's lien on the crops grown on the leased premises..

On account of the foregoing errors, the judgment appealed from should be reversed, and the cause remanded to the county court of Jefferson county, and a new trial ordered.

By the Court: It is so ordered.

GRAHAM *et al.* v. ATWOOD.

No. 3286. Opinion Filed November 25, 1913.

(136 Pac. 1080.)

1. **APPEAL AND ERROR — Case-Made — Sufficiency — Evidence.** Where consideration of the assignments of error require an examination of the evidence, and the case-made does not contain an affirmative recital that it contains "all the evidence" introduced at the trial, no questions for review are presented by such assignments.
2. **SAME—Certificate—Dismissal.** The signature of the trial judge to the certificate settling a case-made not being attested by the seal of the court, and the case-made not having been filed with the papers in the case, as required by section 5242, Rev. Laws 1910, no questions for review are presented by such record, and the appeal should be dismissed.

(Syllabus by Galbraith, C.)

Error from County Court, Garvin County;

W. B. Mitchell, Judge.

Action by G. A. Atwood against Will Graham and others on an account for labor performed and board and lodging of certain laborers. Judgment for plaintiff, and defendants bring error. Dismissed.

Jas. S. Twyford and Giddings & Giddings, for plaintiffs in error.

Thompson & Patterson, for defendant in error.

Dievert et al., School Board of District No. 79, v. Rainey et al.

Opinion by GALBRAITH, C. Two reasons appear why the record in this case presents no question for review.

First. The errors assigned in the main require an examination of the evidence introduced at the trial in the court below. The case-made contains no recital that it contains "all the evidence" introduced at the trial, and an examination of it shows affirmatively that it does not contain all the evidence. It appears that a certain written statement of account and certain time checks that were material in establishing the amount of the plaintiff's claim, and which were introduced in evidence, have not been incorporated in the case-made. *Waltham Piano Co. v. Wolcott*, 38 Okla. 770, 135 Pac. 339.

Second. The case-made is not sufficiently authenticated. The certificate of the trial judge to the case-made bears date of April 20, 1911; but the seal of the court is not attached thereto, nor does it appear that the case-made was filed with the papers in the case, as required by section 5242, Rev. Laws 1910. *Stallard v. Knapp*, 9 Okla. 591, 60 Pac. 234; *Marple v. Farmers' & Merchants' Bank*, 28 Okla. 810, 115 Pac. 1124; *Brooks et al. v. United Mine Workers of America*, 36 Okla. 109, 128 Pac. 236; *Oklahoma City v. McKean*, 39 Okla. 300, 135 Pac. 19.

It follows that the appeal should be dismissed.

By the Court: It is so ordered.

DIEVERT *et al.*, School Board of District No. 79,
v. RAINEY *et al.*

No. 3302. Opinion Filed November 25, 1913.

(136 Pac. 1086.)

APPEAL AND ERROR—Brief—Failure to File. Where the plaintiff in error has filed brief, as required by rule 7 of this court (38 Okla. vi), and the defendant in error fails to file brief, as required by such rule, or to offer any excuse for not doing so, the court will be justified in taking as confessed the errors assigned, to the extent of reversing the judgment appealed from.

(Syllabus by Galbraith, C.)

Dievert et al., School Board of District No. 79, v. Rainey et al.

*Error from County Court, Garfield County;
Winfield Scott, Judge.*

Action by Lewis Dievert, Director, and others, composing the School Board of District No. 79, Garfield County, against George Rainey and Geo. J. Emerick, on an injunction bond. Judgment for defendants, and plaintiffs bring error. Reversed.

O. D. Hubbell, for plaintiffs in error.

Opinion by GALBRAITH, C. In October, 1907, George Rainey instituted an action in the district court of Garfield county, Okla., against the plaintiffs in error, for an injunction, and secured a temporary injunction on executing a bond in the sum of \$300, conditioned to pay all costs or damages that the defendants might sustain by reason of the issuance of the injunction, in case the same was wrongfully obtained. The bond was executed by George Rainey, as principal, and George J. Emerick, as surety, and was approved by the clerk and filed in the district court of Garfield county on October 16, 1907. The instant case was an action commenced in the county court of Garfield county to recover damages on this injunction bond. The defendants in error, as defendants in that suit, interposed a general demurrer to the amended petition, which was by the court sustained. Plaintiffs excepted to the ruling of the court, and, electing to stand on their amended petition, refused to plead further, and judgment was entered against them, dismissing the action, and for costs. They have appealed to this court by petition in error and case-made.

The one assignment of error urged by plaintiffs in error is that the court erred in sustaining a general demurrer to the amended petition. The record was filed in this court on November 15, 1911. Plaintiffs in error's brief and argument was filed on May 9, 1912. The defendants in error have filed no brief, and have offered no excuse for not having done so. Rule 7 of this court, *supra*, requires the defendant in error, as well as the plaintiff in error, to file brief and argument, but prescribes no penalty for failure to do so, except that it provides that:

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“In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment, in its discretion.”

The rule was announced by the territorial Supreme Court that where the plaintiff in error has complied with the rule by filing brief and argument, and the defendant in error fails to do so, the court will take the defendant's failure to comply with the rule as a confession of the alleged error, at least so far as to warrant a reversal of the judgment. *Nettograph Machine Co. v. Brown*, 19 Okla. 77, 91 Pac. 849. This rule has been followed by the Supreme Court of the state in *Butler v. McSpadden*, 25 Okla. 465, 107 Pac. 170; *Ellis v. Outler*, 25 Okla. 469, 106 Pac. 957; *Rudd v. Wilson et al.*, 32 Okla. 85, 121 Pac. 252; *First National Bank of Tishomingo v. Blair*, 31 Okla. 562, 122 Pac. 527; *Clark v. First National Bank*, 36 Okla. 601, 129 Pac. 696. The brief and argument of the plaintiffs in error seem reasonably to support the contention that the court erred in sustaining the demurrer to their petition. Under the rule as announced in the above cases we feel justified in holding that this assignment of error is confessed by the defendants in error by reason of their failure to file a brief, at least to the extent of justifying an order reversing the order of the county court sustaining the demurrer.

We, therefore, hold that the judgment appealed from should be reversed, and the cause remanded to the county court of Garfield county for such further proceedings as may be proper.

By the Court: It is so ordered.

Red River Valley Cotton Co., Inc., v. J. W. Stalcup Mercantile Co.

RED RIVER VALLEY COTTON CO., Inc., v. J. W.
STALCUP MERCANTILE CO.

No. 3312. Opinion Filed November 25, 1913.

(136 Pac. 1115.)

1. **JUSTICES OF THE PEACE—Process—Amendments.** A summons in a justice court against a partnership, which does not show the individual name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment.
2. **SAME—Appeal—Appearance—Waiver of Defects in Process.** In an action against a partnership in the firm name alone, where the pleadings show the individual names composing the firm, although the individuals are not personally served with summons, but voluntarily appear and join in a demurrer to the bill of particulars, on the ground that no cause of action is stated and that no one has been sued in the action, held, it is error to sustain such demurrer.
3. **PARTNERSHIP—Definition and Nature.** Though a "partnership" is not a person, it is a legal entity under Rev. Laws 1910, secs. 4431-4474, and for some purposes is recognized as a quasi person having the powers and functions exercisable by one of the partners severally or all of them jointly. It may be a debtor or a creditor within the meaning of the statute.

(Syllabus by Galbraith, C.)

Error from County Court, Hughes County;
H. H. Rogers, Special Judge.

Action by the Red River Valley Cotton Company, Incorporated, against the J. W. Stalcup Mercantile Company, a partnership, to recover an excess paid on cotton sold and delivered. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. M. Crook, for plaintiff in error.

Crumph & Skinner and Walker & Fancher, for defendant in error.

Opinion by GALBRAITH, C. The Red River Valley Cotton Company, a corporation, sued J. W. Stalcup Mercantile Company, a partnership, before a justice of the peace in Hughes

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county, to recover \$141.17 for money paid by mistake on certain cotton sold and delivered. From a judgment in favor of the plaintiff, the defendant appealed to the county court, where a trial was had resulting in a judgment for the defendant. A new trial was granted, but on a showing the county judge disqualified himself, and by agreement of parties Harry H. Rogers, a member of the bar of Hughes county, qualified as special judge to try said cause. The plaintiff amended its pleadings in the county court, and increased the amount of its claim to \$200. The cause was called for trial, and, after the witnesses had been sworn and the plaintiff had commenced the examination of its first witness, objection was made by the defendant to the introduction of further testimony on the ground that no one had been sued by the plaintiff. Whereupon, by permission of the court, the plaintiff was permitted to amend its bill of particulars by interlineation, alleging that "J. W. Stalcup Mercantile Company is a firm composed of J. W. Stalcup and Mollie Everidge." Whereupon a demurrer was interposed to the last amended petition upon the ground that said amended petition does not state a good and sufficient cause of action against J. W. Stalcup and Mollie Everidge, which was sustained; the court saying that in his opinion "this action cannot be maintained against J. W. Stalcup and Mollie Everidge for the reason that it would be an entirely new cause of action and have to be brought in a separate and distinct suit, and for the further reason that no summons was ever issued or served in this cause upon J. W. Stalcup and Mollie Everidge," and thereupon dismissed the suit and rendered judgment against the plaintiff for costs. To which action of the court the plaintiff excepted, and prosecutes an appeal to this court by petition in error and transcript.

From the foregoing statement it will appear that there is only one assignment of error presented on this appeal. The court below doubtless proceeded upon the theory that a partnership is not a separate and distinct legal entity apart from the individuals composing the firm. Under the common law this view was correct, but under the statute such as articles 1 and 2 of chapter 56, Rev. Laws 1910, a partnership is regarded as a legal entity

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apart from the individuals composing it. This view is well expressed by the Supreme Court of Georgia in the first paragraph of the syllabus in *Drucker & Brothers v. Wellhouse & Sons*, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328, as follows:

"Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly. It may be a debtor or a creditor within the meaning of a statutory enactment."

Plaintiff in its bill of particulars filed in the justice court made the J. W. Stalcup Mercantile Company, a firm composed of J. W. Stalcup and Mollie Everidge, defendant, and the summons issued therein "commanded to summons J. W. Stalcup Mercantile Company, a firm composed of J. W. Stalcup and Mollie Everidge," to appear and answer and was served upon "J. W. Stalcup of the J. W. Stalcup Mercantile Company." It appears, however, that J. W. Stalcup appeared in said cause and filed an affidavit for continuance, and that on appeal to the county court also filed an affidavit of prejudice of the regular county judge against him as a defendant in said cause, and that J. W. Stalcup and Mollie Everidge, members of the partnership composing the firm of J. W. Stalcup Mercantile Company, appeared in the county court and urged the demurrer against the plaintiff's bill of particulars on jurisdictional as well as nonjurisdictional grounds. From these facts it appears that they were in court just as effectively and just as completely as if they had been regularly summoned, and the trial court should have so treated them.

In the case of *Morse v. Barrows*, 37 Minn. 239, 33 N. W. 706, the defendant was sued and summoned as Jacob Barrows, while his true name was Chauncey W. Barrows. On the return day of the writ the defendant appeared specially and filed a plea of abatement showing his true name, and prayed a dismissal of the action. His plea was denied, and the plaintiff was permitted to amend his pleadings and correct the process by striking out the name of "Jacob" and inserting "Chauncey W." The Supreme Court of Minnesota said, in approving this action:

"With the defendant before him for the purpose, the justice had authority to correct the error by causing the true name to

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be inserted in the writ (section 10, c. 65, Gen. St. 1878); and, the defendant having appeared before the justice to plead the misnomer, he was there for the purpose of whatever it was proper for the justice to do by reason thereof; for the purpose of correcting the error, as the justice was authorized to do when the true name was discovered."

In *Bank v. Magee*, 20 N. Y. 355, it seems that Charles Cook was engaged in the banking business under the name of the "Bank of Havana," and commenced a suit in that name, and upon objection it was held that the error in bringing the suit in the name he had assumed for the transaction of his banking business was an error that might be corrected before or after judgment in furtherance of justice, and Judge Comstock said:

"Mr. Cook has simply misnamed himself. He has taken the name which he uses in a particular business, and, quite irregularly, has introduced himself to the courts by that name. This he should have not done. He ought to have sued in the surname * * * and the Christian name given in baptism, but I consider this a mere irregularity in procedure."

The statute (section 4790, Rev. Laws 1910) is broad and liberal in its terms in permitting amendment in pleadings or process in the interest of justice, and the only particular limitation placed upon this power vested in the court is that the amendment should not substantially change the cause of action or defense. North Dakota has a statute identical with this, and in a case very similar to the case at bar the court said:

"Defendant's contention is that the use of the partnership's name to designate the plaintiffs in the summons was a fatal irregularity, equivalent to an entire omission of the name of any plaintiff, and hence the summons was a nullity. It is true that the use of the partnership name as the only designation of plaintiffs was irregular. The summons was not, however, a nullity for that reason. The partnership name furnished the means of identifying the plaintiffs, and it cannot therefore be said that the firm name was the same as no name. It was merely an irregularity which could be waived by the defendant, if he failed to object, and could be cured by amendment. Encl. P. & Pr. vol. 15, p. 841, and notes; *Bank v. Magee*, 20 N. Y. 355; *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992; *Johnson v. Smith*, Morris (Iowa) 106. The defendant was entitled to have the record disclose on its face the names of all the persons who composed the

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plaintiff firm. He was not, however, entitled to a dismissal of the action, unless the plaintiffs failed or declined to make the necessary amendment. It is provided by the Code of Civil Procedure (Rev. Codes 1899, sec. 5297) that any pleading, process, or proceeding may be amended 'by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect.' It is contrary to the policy of the Code of Civil Procedure to dismiss an action for mere irregularities of practice which can be remedied by amendment without prejudice to the substantial rights of the parties. It cannot be pretended that the amendment allowed by the justice in this case would prejudice defendant's rights in the slightest degree. The provisions of the Code of Civil Procedure govern the proceedings in justice court so far as applicable, when the mode of procedure is not prescribed by the Justice Code. Rev. Code 1899, sec. 6625. There is nothing in the latter Code inconsistent with the observance by a justice of the provisions of section 5297." (*W. F. Morgridge and F. E. Merric, etc., v. Jacob Stoeffer*, 14 N. D. 430, at 432, 433, 104 N. W. 1112, 1113.)

Again, in 4 N. D. 140, 59 N. W. 714, in the case of *Gans v. Beasley*, the first paragraph of the syllabus is as follows:

"A summons, otherwise in due form, in which the defendants are designated only by their firm name, is irregular, but not absolutely void, and may be amended in the trial court so as to show the names of the partners. Such a summons, when issued, is sufficient to sustain an attachment."

Mr. Justice Hayes, in referring to the above cases, said:

"The reasoning and rule of these cases as to summons at the commencement of an action are equally applicable to a summons issued at the commencement of a proceeding in error. We should overrule the motion to dismiss and grant plaintiff in error leave to amend the summons in error by inserting therein the names of the individuals composing the partnership, if we were not compelled to sustain the motion upon other grounds." (*Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co.*, 23 Okla. 833, 102 Pac. 712.)

It was error in the trial court to sustain the demurrer to the amended petition, since the defendants were in court voluntarily, although they had not been regularly summoned, and the court had jurisdiction of their persons, and he should have overruled the demurrer, permitted the amendment requested by the plaintiff, and proceeded with the trial of the cause on its merits.

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On account of these errors, the judgment appealed from should be reversed, and the cause remanded for further proceedings not inconsistent with the views above set out.

By the Court: It is so ordered.

KIMBERLIN v. EPHRAIM.

No. 2312. Opinion Filed October 14, 1913.

On Rehearing December 9, 1913.

(136 Pac. 1099.)

1. **APPEAL AND ERROR—Libel and Slander—Harmless Error—Admission of Evidence.** In an action for defamation, where defendant pleads the general issue, evidence that the plaintiff has a brother, not a party to the action nor a witness, who is a fugitive from justice, is incompetent and not within the issues, but the admission of such testimony is not ground for reversal unless it clearly appears that the plaintiff was injured thereby.
2. **SAME.** In an action for defamation, where plaintiff in direct examination was permitted, without objection, to show his family connection, so far as favorable, in order to aggravate his damages, and defendant on cross-examination was allowed, over objection, to show further family connection unfavorable in mitigation of damages, a verdict for the defendant will not be set aside, and a new trial ordered, since it does not appear that the plaintiff was injured by the admission of such testimony.

(Syllabus by Galbraith, C.)

Error from District Court, Cleveland County;
R. McMillan, Judge.

Action by Kemper Kimberlin, a minor, by his mother, Mrs. S. B. Kimberlin, against Frank Ephraim for damages on account of slander. Judgment for defendant, and plaintiff brings error. Affirmed.

Ben F. Williams and F. B. Swank, for plaintiff in error.

J. B. Dudley and John E. Luttrell, for defendant in error.

Opinion by GALBRAITH, C. The plaintiff in error, a minor, commenced an action in the district court of Cleveland coun-

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ty, by his mother as next friend, against the defendant in error, for damages for defamation on account of certain false, malicious, and defamatory words alleged to have been spoken and published of and concerning him, as follows:

"'Kemper, did you steal my diamonds? Yes, you stole them, and I want you to tell me where they are.' Thereby charging the said Kemper Kimberlin with the crime of theft; that said statement was made to said Kemper Kimberlin in the public schoolhouse in the city of Norman, in Cleveland county, state of Oklahoma, and in the presence of a large number of students and other persons there assembled, whose names plaintiff is unable to allege at this time; that at the time said statement and charge was made by the said defendant, as aforesaid, he, the said defendant, without the consent and over the objections and protest of the said Kemper Kimberlin, by force and threats, forcibly thrust his hands into the pockets of the said Kemper Kimberlin and searched him, very much to the humiliation, mortification, and embarrassment of the plaintiff; that said statements were made orally and with the malicious intent and for the purpose on the part of the defendant to cause it to be said of and concerning the said Kemper Kimberlin, by other persons residing in Norman, Cleveland county, Okla., that he had been guilty of the crime of theft, and was grossly wanting in honor and uprightness, and was designated as a thief in said town, and with the malicious intent and for the purpose of causing it to be so believed of the said Kemper Kimberlin in the town of Norman, where he lives; alleging that said allegations were malicious and false, and were so known to be false by the defendant at the time they were made; alleging that the defendant is a man of great wealth and has a large business; and that his business and social standing is such that it gave great weight to his statements; and that the plaintiff has suffered great pain, anguish, and mortification on account of the shame and disgrace cast on him in the community in which he lives."

In an additional cause of action he alleges:

"That on the 19th day of February, 1908, said defendant, falsely, maliciously caused to be published in the Daily Oklahoman, a newspaper published in the city of Oklahoma, county of Oklahoma, state of Oklahoma, same having a general circulation therein, an article the caption of which reads as follows: 'Norman thief takes jewels worth \$1,000.' That in causing said article to be published, the said defendant intended to have it understood by the general public in the city of Norman, and

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state of Oklahoma, that the said Kemper Kimberlin was the person referred to in said article, and thereby charging said Kemper Kimberlin with the crime of theft."

The defendant answered by a general denial. The cause was tried to the court and a jury, and a verdict rendered in favor of the defendant. The plaintiff brings the case here on petition in error and case-made.

While many assignments are made in the petition in error, only two are argued in the brief, and the other assignments will, as a matter of course, be taken as waived. For convenience the assignments will be taken in reverse order to that in which they are presented in the brief.

A general exception was taken by the plaintiff in error to some twelve instructions of the court to the jury; but as this exception is general in form, under the rule established in this jurisdiction, it is not sufficient to justify this court in considering any particular instruction. *Eisminger v. Beman*, 32 Okla. 818, 124 Pac. 289, and cases there cited. For this reason the errors complained of in regard to the court's instructions cannot be reviewed.

The other assignment urged by the plaintiff in error is that the court overruled his objection to certain questions asked the plaintiff by counsel for the defendant in error on his cross-examination, whereby he was compelled to answer that he had a brother, Zay Kimberlin, who was accused of cattle stealing, and who forfeited his bond, and was at the time of the trial a fugitive from justice. It is contended by the plaintiff in error that this evidence was irrelevant and without the issues, and its admission over his objection was reversible error. The defendant in error justifies the ruling of the court on the ground that the plaintiff had proved by another brother and the mother of the plaintiff, who had preceded him on the stand, that this brother who testified was engaged in the clothing business at Norman, and had brought out the same fact by this witness in his direct examination, and that the purpose of the evidence was to show the business connection of the plaintiff in order to aggravate his damages, and that, since the favorable family connection of the plaintiff

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had been brought out on direct examination, he was justified on cross-examination in showing other and further family connection unfavorable in mitigation of damages. It is clear that this evidence was irrelevant and without the issues of the case, since Zay Kimberlin, the fugitive, was not a party to nor a witness in the case. But was the admission of this testimony such an error as would justify this court in reversing the case and remanding it for a new trial? The defendant, having pleaded the general denial, did not attempt to justify the alleged slander, but denied it.

It appears from the record that the court in its instructions told the jury as a matter of law that the words alleged to have been spoken of the plaintiff by the defendant were actionable *per se*. The jury by their verdict found, in effect, that the defendant did not speak, or cause to be published, the slanderous words as charged in the petition. If the verdict of the jury had been for the plaintiff, then it might be contended that the admission of the irrelevant testimony complained of might have influenced their verdict, and induced them to give a less amount in damages than they would have done if this testimony had been excluded, and it might then have been apparent that the plaintiff was injured by the ruling of the court complained of. But since the verdict was for the defendant, it does not appear that the plaintiff was injured by this testimony, and, if he was not injured by it, it is not ground for reversal, although it was error to admit it. It is not every error of this kind that will entitle the complaining party to a reversal. The Legislature has limited the power of the court in this regard. Section 4791 of the Civil Code (Rev. Laws 1910) reads:

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

See, also, *Woodward v. Bingham*, 25 Okla. 400, 106 Pac. 843; *St. L. & S. F. R. Co. v. Houston*, 27 Okla. 719, 117 Pac. 184.

The plaintiff had been permitted to show, without objection, that one of his brothers, Ezel Kimberlin, was engaged in the clothing business at Norman. This evidence, although admitted

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without objection, was also irrelevant. Did this justify the defendant in bringing out on cross-examination the fact that the plaintiff had another brother who was charged with theft and was a fugitive from justice? The position of counsel for defendant in error finds support in excellent authority. Mr. Wigmore, in his work on Evidence (volume 1, par. 15), discusses the question:

“Does one inadmissibility justify or excuse another? If the one party offers an inadmissible fact which is received, may the opponent afterwards offer similar facts whose only claim to admission is that they negative or explain or counterbalance the prior inadmissible fact? * * * On this subject three different rules are found competing for recognition in the different jurisdictions. (1) The first is that the admission of inadmissible facts, without objection by the opponent, does not justify the opponent in rebutting by other inadmissible facts. This rule is represented by some English authority and by a respectable number of American jurisdictions. (2) At the other extreme is a rule which declares that in general precisely the contrary shall obtain, *i. e.*, the opponent may resort to similar inadmissible evidence. This rule has also ample authority, and is perhaps to be regarded as the orthodox English rule. (3) A third form of rule, intermediate between the other two, is that the opponent may reply with similar evidence whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original evidence, but in no other case. This seems to be the true significance of what may be called the Massachusetts rule. The source of these divergent views is apparent enough. By the courts adopting the first rule the emphasis is placed upon the circumstance that the opponent did not in the first instance object; hence his waiver of objection leaves him without ground for maintaining that the original evidence was a wrong which estops the original offeror from now objecting. By the courts adopting the second rule, on the other hand, the emphasis is placed upon the original party's voluntary action in offering the evidence, by which he virtually waives future objection to that class of facts. Both these circumstances of waiver are true; it is simply a question of relative emphasis; hence the contradictory views. But it may be noted that under the first rule, in most all the cases, the counter evidence had been rejected below, while under the second rule, in almost all the cases the counter evidence had been admitted below, *i. e.*, the courts under both rules reached practically the same result in that they refused to disturb the

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ruling below. This points to the true rule, namely, that since each party is alike in the condition of *volenti non fit injuria*, neither can complain of a ruling either admitting or rejecting; a waiver being predicable of both. The matter is thus left in the hands of the trial court. Modify this in certain cases by conceding to the opponent, as of right, to use the curative counter evidence when a plain and unfair moral prejudice would otherwise have inured to him, and the rule will be sufficiently flexible."

The Supreme Court of Oklahoma Territory, early in its history, announced the rule that this question should be "left in the hands of the trial court," and its ruling should not be disturbed, unless manifest injury is shown to have resulted to the complaining party. *Watkins v. United States*, 5 Okla. 729, 50 Pac. 88; *Yingling v. Redwine*, 12 Okla. 64, 69 Pac. 810; *City of Guthrie v. Carey*, 15 Okla. 276, 81 Pac. 431; *Harrold v. Territory*, 18 Okla. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818. This court has followed the same rule:

"The improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal." (*City of Anadarko v. Argo*, 35 Okla. 115, 128 Pac. 500.)

See, also, *Mullen v. Thaxton*, 24 Okla. 643, 104 Pac. 359; *Diamond et al. v. Inter-Ocean News Paper Co.*, 29 Okla. 323, 116 Pac. 773; *St. Louis & S. F. R. Co. v. Rushing*, 31 Okla. 231, 120 Pac. 973; *M., K. & T. Ry. Co. v. Jones*, 32 Okla. 9, 121 Pac. 623.

An examination of the entire record in this case shows that the trial court was particularly liberal toward the plaintiff in his rulings during the course of the trial, and since the questions in the case were principally questions of fact, and these were submitted to the jury for determination and by the jury found in favor of the defendant, we feel that the verdict and judgment of the trial court ought not to be disturbed, and that the judgment appealed from ought to be affirmed.

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ON REHEARING.

The petition for rehearing in this case presents one point that has challenged the serious consideration of the court, namely, whether or not the exceptions to certain instructions of the trial court were properly taken; it having been held in the original opinion that these exceptions were general and not sufficient to bring the instructions up for consideration. In view of the doubt suggested as to the correctness of that holding, we have carefully considered the instructions complained of, as well as other instructions given, and have reached the conclusion that the same fairly state the law of the case under the issues and facts proved and are convinced that the plaintiff in error had a fair trial before "a jury of his peers," and that the petition for a rehearing should be denied.

By the Court: It is so ordered.

FARM LAND MORTGAGE CO. *et al.* v. WILDE.

No. 2776. Opinion Filed October 14, 1913.

Rehearing Denied December 9, 1913.

(136 Pac. 1078.)

1. **VENDOR AND PURCHASER—Performance of Contract—Warranty Deed.** Where a copartnership contracts to convey to another by its warranty deed a certain tract of land the title to which at the time is vested in some third party, the procuring of the conveyance of the land by such third party with his warranty will not answer the requirements. The party who is to receive the deed is entitled to have the warranty of him who agreed to convey as a further security of title.
2. **SAME—Contracts—Binding Effect of Provision.** The courts generally hold that parties have the right to make any contract which is not unlawful nor against public policy. They have the right to provide for an arbitrator whose decisions, in the absence of fraud, shall be final. They have the right, in making a contract for the sale of land, to make an attorney or any one else exclusive and final judge as to whether or not the title is defective. In such case, the courts are inclined to leave the parties to abide by the contract as they have made it, and not to make a different one.

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3. **SAME—Recovery of Purchase Money—Direction of Verdict.** Where a copartnership contracts to convey real estate by its warranty, such title to be pronounced perfect by an attorney selected by the party who is to receive the deed, and further contracts that in the event of failure to do these things it will return the money previously paid, then in a suit to recover back the amount paid for failure to do such things, and the proof shows a failure, and there is no evidence to the contrary, it is not error to direct a verdict for the return of the amount paid.

(Syllabus by Harrison, C.)

*Error from Superior Court, Muskogee County;
Farrar L. McCain, Judge.*

Action by J. L. Wilde against the Farm Land Mortgage Company, a copartnership, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Benj. F. Rice and Thos. D. Lyons, for plaintiffs in error.

Hutchings & German and Allen & Nichols, for defendant in error.

Opinion by HARRISON, C. This action was begun in the superior court of Muskogee county, October 19, 1909, by John L. Wilde against the Farm Land Mortgage Company, a copartnership consisting of Carl Anderson, Seth Ely, and J. E. Tomlinson, on a contract for purchase of real estate. The plaintiff alleged, in substance, that on August 14, 1909, he entered into a contract with defendant for the purchase of certain tracts of real estate, aggregating 560 acres, situated in McIntosh county. The contract was attached to and made a part of the petition, and provided that the agreed purchase price should be \$14,000, \$3,000 of which was to be paid in hand, and was paid at the time of the execution of the contract, the balance to be paid on delivery of deed and abstract showing perfect title, same to be delivered on or about October 10, 1909. It provided, further, that the first party (the company) was to furnish an abstract of title down to date, showing perfect title free of all valid liens, and to give warranty deed. It provided, further, that such abstract was to be passed upon by a resident lawyer of Oklahoma, to be selected by the second party, Wilde, and further provided that in case the first party be unable to furnish the deed and abstract showing

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perfect title as set forth in the contract, then the first party should repay to the second party all payments made on the contract, same to constitute full settlement of all claims of either party to the contract. For failure on the part of the company to furnish such abstract and its refusal to repay the \$3,000 plaintiff instituted this action for the recovery of the \$3,000, interest and costs. Defendant answered, admitting the allegation of copartnership of the company and the entering into the contract, but alleged that in the description of the various subdivisions of land in the contract a certain 40 acres, to wit, the S. W. quarter of section 8, township 10, range 17, was by mutual mistake included in the contract, whereas the intent of the parties to the contract was not to include such 40-acre tract, that defendant company had contracted to convey only 520 acres, and did not contract to convey the 40 acres in question, and that plaintiff so understood the contract at the time it was entered into. The answer further alleged that defendant had performed all the conditions required of it, but the plaintiff had refused to pay the balance due under said contract, upon the ground that defendant had refused to convey title to the said 40-acre tract in question. Defendant also alleged damages in the sum of \$7,000, and prayed judgment for \$4,000 in addition to the \$3,000 already received. The issues being thus joined, the cause was tried in January, 1911, resulting in a peremptory instruction in favor of plaintiff for the sum of \$3,332.50. From such judgment the mortgage company appeals.

Numerous assignments of error are made by plaintiffs in error, but the decisive issue involved in the case is whether the company, under the terms of the written contract, tendered to Wilde the character of deed contemplated in the contract, together with an abstract showing perfect title to the land. A proper determination of this issue does not require a determination of the question whether the extra 40 acres was included in the contract or not. The record shows that no deed from the company to Wilde was ever tendered to the remaining portion of the land. The record shows that Anderson, one of the members of the copartnership, had procured deeds to himself for 520 acres of the land, and that he tendered a deed from himself and

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his wife to such tracts to Wilde, through his attorney Allen. But this was not the contract. The contract was that the company should make Wilde a warranty deed to the land, and Wilde may have been justified in preferring a warranty from the company rather than a warranty from Anderson and his wife, or from the individual members of the company. This was the warranty he had contracted for and agreed to pay his money for, and which under the law he had a right to demand.

"Where one party agrees to convey to another by warranty deed a certain tract of land, the legal title to which is vested in a third person, the procuring of the conveyance of the land by such third person with his warranty will not answer its requirements. The party who was to receive the deed is entitled to have the personal covenants of him who agreed to convey as a further security for his title." (1 Warvelle on Vendors, sec. 347.)

Crabtree v. Levings, 53 Ill. 526; *Rudd v. Savelli*, 44 Ark. 145; *McMurry v. Fletcher*, 24 Kan. 574; *Ruffner v. McConnell*, 17 Ill. 212, 63 Am. Dec. 364.

And aside from this, the contract provided "said abstract to be passed upon by a resident lawyer of Oklahoma, employed by second party." This clause does not necessarily imply that such lawyer was to be the attorney of Wilde any more than he was to be the attorney of the company. It might imply that he was to be paid by Wilde, but it does specifically state "said abstract to be passed upon by a resident lawyer of Oklahoma," and this necessarily implies that such lawyer should have authority and was bound in honor to reject same unless it showed a perfect title. The lawyer claimed in his testimony that at the time the abstract was presented to him for examination it disclosed a defective title, in that it showed that the deed from certain allottees to a portion of the land, which at that time required the approval of the Secretary of the Interior, had not been so approved, that it also showed that the probate proceedings in reference to certain minor heirs, through whom the title to other portions of the land was to come, was also defective, and also pointed out other defects and irregularities in the probate proceedings which, in his judgment, rendered the title bad, and that for such reasons he rejected the title. This provision of the contract that

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the title should be passed upon by a resident attorney was entered into by both parties to the contract. Either party had the right to rely upon the judgment and opinion of such lawyer.

"The courts generally hold that parties have the right to make any contract which is not unlawful nor against public policy. They have the right to provide for an arbitrator, whose decision, in the absence of fraud, shall be final. They have the right, in making a contract for the sale of lands, to make an attorney or any one else exclusive and final judge as to whether or not the title is defective. In such case the courts are inclined to leave the parties to abide by the contract as they have made it, and not to make a different one." (*Simmons v. Zimmerman*, 144 Cal. 264, 79 Pac. 452, 1 Ann. Cas. 850.)

Also *Brown v. Foster*, 18 Am. Rep. 463; *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Goodrich v. Van Nortwick*, 43 Ill. 445; *Goodwine v. Kelley*, 33 Ind. App. 57, 70 N. E. 834; *Silsby Mfg. Co. v. Town of Chico* (C. C.) 24 Fed. 894; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57. The company having failed in these two essential provisions of the contract, and having contracted that in event of failure to do these things it would return the money paid, we see no reason why it should not be required to do so, nor error in the court's requiring it to do so. These were the considerations which Wilde contracted to pay his money for—a title warranted by the company and pronounced perfect by an attorney upon whose judgment he relied.

There being no evidence that these things were done, we see no error on the part of the court in directing a verdict for the return of the money.

By the Court: It is so ordered.

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WHITE *et al.* v. STARBUCK *et al.*

No. 2788. Opinion Filed June 19, 1913.

Rehearing Denied December 9, 1913.

(133 Pac. 223.)

1. **INDIANS—Trusts—Action to Establish.** A petition which alleged that plaintiff, a member of the Cherokee Tribe of Indians, filed upon certain land in March, 1903; that she has been in possession of the land ever since that date; that on the 13th of May, 1904, a Delaware Indian filed a contest on a portion of the land filed on by plaintiff in March, 1903; that plaintiff and the contestant compromised in November, 1904, and plaintiff confessed judgment in favor of the contestant for the portion claimed in the contest, and paid the contestant \$200, and the contestant agreed to release her claim to the land in controversy and other land; that plaintiff leased the land in controversy for oil and gas purposes in August, 1904; that the lessee went into possession of the land and bored two wells thereon and paid plaintiff royalties thereon; that the Commissioner to the Five Civilized Tribes on the 28th of June, 1906, arbitrarily, on his own motion and without notice to plaintiff, canceled her filing; that on said 28th day of June, 1906, Amos White, one of the defendants, presented to the Land Office a bill of sale from the Delaware, who formerly claimed some rights in the property, executed in consideration of the sum of \$12, and that the land was allotted to him, and that plaintiff exhausted her remedies before the Interior Department in endeavoring to have the order canceling her filing revoked, states a cause of action, which, if true, entitles her to have a judgment decreeing that White holds the land as her trustee.
2. **SAME—Allotment—Cancellation.** The lands in the Cherokee Nation, not segregated from allotment as provided by section 25 of the Curtis Bill (Act June 28, 1898, c. 517, 30 St. at L. 504), were subject to allotment prior to the final decision of the case of **Delaware Indians v. Cherokee Indians**, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646, and a filing on such land could not be canceled after the expiration of nine months from the date of the filing in the absence of fraud.
3. **SAME—Sale of Improvements.** Act April 21, 1904, c. 1402, 33 St. at L. 189, and Act March 3, 1905, c. 1479, 33 St. at L. 1048, giving Delaware Indians the right to sell improvements on lands of which they were in rightful possession April 21, 1904, in excess of the amounts which they could take as their allotments, did not give them the right to sell improvements on lands which had been allotted to members of the Cherokee Tribe and in possession of such members more than a year prior to the 21st of April, 1904.
(Syllabus by Rosser, C.)

Opinion of the Court.

*Error from District Court, Washington County;
John J. Shea, Judge.*

Action by Goldie Starbuck against Amos White, W. G. Sawyer, and others. Judgment for plaintiff, and defendants named bring error. Affirmed.

Geo. S. Ramsey and C. L. Thomas, for plaintiffs in error.

Allen & Nichols, for defendants in error.

Opinion by ROSSER, C. This is an action by Goldie Starbuck, as plaintiff, against Amos White and others, as defendants, to have the defendant Amos White decreed to be the trustee for the plaintiff of certain lands in the Cherokee Nation. The petition alleges, in substance, that plaintiff is a member of the Cherokee Tribe of Indians; that the land in controversy was allotted to her by the Commissioner to the Five Civilized Tribes on the 2d day of March, 1903, and that she received certificates of allotment therefor upon that date; that afterwards, on the 13th of May, 1904, Ida M. Swannock instituted a contest against plaintiff for certain land filed upon by plaintiff, but afterwards, on the 1st day of November, 1904, a compromise was entered into between said Ida M. Swannock and the plaintiff by which the plaintiff agreed to confess judgment for the portion claimed by Ida M. Swannock in her contest, and Ida M. Swannock agreed to relinquish all her claims, if she had any, to the improvements upon any other part of the land selected as the allotment of the plaintiff, and that in pursuance of the agreement Ida M. Swannock went before the Commissioner and relinquished all of her claims, and that the plaintiff also paid Ida M. Swannock \$200 in cash in further consideration of the claim; that the plaintiff is now and has been ever since the 2d of March, 1903, in the actual, open, notorious, peaceable, and undisputed possession of all her allotment, and all the improvements; that on or about the 5th of August, 1904, plaintiff executed to one Benjamin F. Holmes an oil and gas mining lease upon the land selected by her, and that he began drilling on the lands, and up until the month of June, 1906, he drilled seven wells upon the land leased to him by the

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plaintiff, two of which were upon the particular portion of the land now in controversy; that on or about the 28th of June, 1906, the Commissioner to the Five Civilized Tribes arbitrarily, on his own motion and without notice to the plaintiff, pretended to cancel her allotment certificate and to cancel her filing on the real estate in controversy, and that said pretended cancellation was procured to be made by the defendants Amos White and W. G. Sawyer, pretending to act for the said Ida M. Swannock, by wrongfully and unlawfully and without the knowledge or consent of the said Ida M. Swannock, making application to the Commissioner to the Five Civilized Tribes to have the lands in controversy certified by said Commissioner as improved Delaware surplus holdings of the said Ida M. Swannock under Acts April 21, 1904, and March 3, 1905, in violation of the agreement made between the plaintiff and Ida M. Swannock; that the plaintiff had no notice, either actual or constructive, that the Commissioner intended to consider the question of canceling her filing on the 28th of June, or any other time, and that the first notice she received of his intention was by a letter of date of July 5, 1906, mailed by the said Commissioner to her at Chanute, Kan., which notified her of the pretended cancellation; that on the 28th of June, 1906, Amos White, one of the defendants, presented to the Cherokee Land Office a pretended approved bill of sale, executed by Ida M. Swannock, dated June 21, 1906, for certain pretended improvements on the land in controversy in this action, and which purported to convey them to the defendant Amos White for the sum of \$12, and that the land was allotted to him. The petition also alleges that, if Ida M. Swannock ever had any rights to the improvements, she had relinquished them long prior to the 21st of June, 1906, and that Amos White obtained no right to the improvements by virtue of said pretended bill of sale; that on the 17th of July, 1906, plaintiff filed a motion for rehearing with the Commissioner, who overruled same without allowing her to appear and introduce any evidence; that she took an appeal from his decision, and that on or about the 2d of February, 1907, the Commissioner of Indian Affairs affirmed his decision; that she took an appeal from the decision of the Com-

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missioner of Indian Affairs to the Secretary of the Interior, and that on April 13, 1907, he affirmed the decision of the Commissioner of Indian Affairs; that afterwards, on the 4th of May, 1907, she filed her complaint with the Commissioner to the Five Civilized Tribes, alleging the facts with reference to the cancellation of her allotment certificate, and that the relief sought was also denied; that each of the officers have committed serious and gross errors of law in pretending to cancel the filings and certificate of allotment of plaintiff, and in awarding the land to Amos White, and refusing to permit the plaintiff to show by evidence her right to hold the real estate in controversy as a portion of her allotment; that the defendants Amos White and W. G. Sawyer have at all times mentioned known that plaintiff was in the actual, open, notorious, and peaceable possession of the real estate in controversy, together with the improvements thereon, and knew that she had leased the land to Holmes for oil and gas purposes, and knew that he had expended a large sum of money in developing it. She attached copies of the decision of the Secretary of the Interior affirming the decision of the Commissioner of Indian Affairs affirming the action of the Commissioner to the Five Civilized Tribes dismissing the complaint which plaintiff filed May 4, 1907, asking that the allotment of Amos White upon the land in controversy be canceled.

The evidence shows that the plaintiff filed on the land in controversy, together with other land, March 2, 1903. On the 13th of May, 1904, Ida M. Swannock filed with the Commissioner to the Five Civilized Tribes a statement of the lands held by her April 21, 1904, in excess of the land allottable by her. This statement did not include the land in controversy. The fact that it did not tends to support plaintiff's theory that Miss Swannock intended to release all the land she had claimed, except that for which plaintiff confessed judgment in her favor. Plaintiff asserts that it did not, but a man named Goodykoontz appeared before the Commissioner later and made claim for her, and the department seems to have regarded the claim by him as sufficient. Miss Swannock also instituted a contest as to certain land which had been filed upon by plaintiff. On the 5th of August, 1904,

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plaintiff executed an oil and gas mining lease on the lands to Benjamin F. Holmes, and that lease was approved by the Secretary of the Interior January 6, 1905. On the 14th of November, 1904, the plaintiff confessed judgment in favor of Miss Swannock to the land upon which the contest had been filed. It would seem from the record that there was a settlement of all differences between these women on that day, though the land in controversy was not described. Goodykoontz testified with reference to the excess land of Miss Swannock. Miss Swannock, in her testimony given later, stated that Goodykoontz's statement was correct, but it does not appear that it was read to her or that she understood what the statement was, and the land in controversy was not described in her examination, either in question or answer. Another hearing was had in 1906, but the notice to plaintiff to appear was addressed to Coffeyville, Kan., instead of Chanute, Kan., her post office, and she did not receive it. It is a matter for remark that the record of the Commissioner showed her post office was Chanute, and other notices were mailed to her there, both before and after the one giving notice of the hearing which she failed to receive. Following this hearing, the filing was canceled. The first notice that she had of the cancellation was on the 9th of July, 1906, and from that time on she has been making all reasonable efforts to get a hearing, but has never been permitted to appear and offer evidence. On the 21st of June, 1906, Miss Swannock sold the improvements on the land in controversy to Amos White for the consideration of \$12, and on the 28th of June White presented the bill of sale to the Land Office, at which time the filing of Goldie Starbuck was canceled, and White was permitted to file upon the land. The evidence also shows that certain lands in the same township with the land in controversy were segregated from allotment in accordance with the provisions of section 25, Act June 28, 1898, 30 St. at L. 495, c. 517, and of section 23, Act July 1, 1902, 32 St. at L. 716, c. 1375, but the land in controversy was not segregated. The testimony is not clear as to how much of the land in controversy was improved prior to the time it was filed.

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The defendants claim title through Ida M. Swannock, and they base her right upon the following provisions of the statutes and treaties between the United States and the Indians:

(1) The Treaty of 1866 of the Delaware Indians (Kapler's Indian Treaties, 937; 14 St. at L. 793), by which it was agreed that the Delaware Indians should move to the Indian Territory.

(2) An agreement between the Delaware Indians and the Cherokee Indians entered into April 8, 1897, by which it was agreed that the Cherokee Nation should sell to the Delawares land amounting altogether to 160 acres for each individual Delaware removing to the Cherokee Nation, and which further provided:

"And in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares to include their improvements according to the legal subdivision when surveys are made (that is to say, 160 acres for each individual) shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation. * * * On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided shall become members of the Cherokee Nation, with the same rights and immunities and the same participation (and no other) in the national funds, as native Cherokees, save as hereinabove provided. And the children hereafter born of such Delawares so incorporated into the Creek Nation shall, in all respects, be regarded as native Cherokees."

See *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646, for the material portion of the text of this agreement.

(3) Section 25 of the Act of June 28, 1898 (30 St. at L. 495), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," commonly known as the Curtis Bill, as follows:

"That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the Commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand six hundred acres purchased by the Delaware Tribe of Indians from the Cherokee Nation under agreement of April eighth, eighteen hundred and

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sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

(4) Section 23, Act July 21, 1902 (32 St. at L. 716, c. 1375), as follows:

"All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe, as their rights may be determined by the judgment of the Court of Claims, or by the Supreme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said Commission is ready to begin the allotment of lands of the tribe as herein provided, the Commission shall cause to be segregated one hundred and fifty-seven thousand six hundred acres of land, including lands which have been selected and occupied by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eighth, eighteen hundred and sixty-seven, such lands so as to remain, subject to disposition according to such judgment as may be rendered in said cause; and said Commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. Said Commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees, and said suit shall be advanced on the dockets of said courts and determined at the earliest time practicable."

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(5) A portion of Act April 21, 1904 (33 St. at L. 189-205, c. 1402), as follows:

"That the Delaware-Cherokee citizens who have made improvements, or are in rightful possession of such improvements, in the Cherokee Nation at the time of the passage of this act shall have the right to first select from said improved lands their allotments, and thereafter, for a period of six months shall have the right to sell the improvements upon their surplus holdings of lands to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose; and the vendor shall have a lien upon the rents and profits of the land on which the improvements are located for the purchase money remaining unpaid; and the vendor shall have the right to enforce such lien in any court of competent jurisdiction. The vendor may, however, elect to take and retain the possession of the land at a fair cash rental, to be approved by the official so as aforesaid designated, until such rental shall be sufficient to satisfy the unpaid purchase price, and when the purchase price is fully paid he shall forthwith deliver possession of the land to the purchaser: Provided, however, that any crops then growing on the land shall be and remain the property of the vendor, and he may have access to the land so long as may be necessary to cultivate and gather such growing crops. Any such purchaser shall, without unreasonable delay, apply to select as an allotment the land upon which the improvements purchased by him are located, and shall submit with his application satisfactory proof that he has in good faith purchased such improvements."

(6) A portion of Act March 3, 1905 (33 St. at L. 1071, c. 1479), as follows:

"That Delaware-Cherokee citizens who have made improvements upon lands in the Cherokee Nation on April twenty-first, nineteen hundred and four to which there is no valid adverse claim, shall have the right within six months from the date of the approval of this act to dispose of such improvements to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose and the amount for which said improvements are disposed of, if sold according to the provisions of this act, shall be a lien upon the rents and profits of the land until paid, and such lien may be enforced by the vendor in any court of competent jurisdiction: Provided, that the right of any Delaware-Cherokee citizen to dispose of such improvements shall,

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before the valuation at which the improvements may be sold, be determined under such regulations as the Secretary of the Interior may prescribe."

The plaintiff relies upon section 21 of the act of Congress approved July 21, 1902, known as the Cherokee Treaty (32 St. at L. 716, c. 1375):

"Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian Agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

And upon section 69 of the same act, which is as follows:

"After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee Tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patents shall issue therefor."

The first proposition urged is that the petition does not state facts sufficient to constitute a cause of action. It is the law that a petition seeking to establish a trust, based on the erroneous action of the department, must set forth with particularity the acts of the department, including the evidence on which it acted, where its findings on a question of fact is material. *Quinby v. Conlon*, 104 U. S. 420, 26 L. Ed. 800; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Ross v. Stewart*, 25 Okla. 611, 106 Pac. 870; *Citizens' Trading Co. v. Bass*, 30 Okla. 747, 120 Pac. 1095. But this petition goes far enough. It discloses that she filed on the land and received a certificate of allotment; that the certificate was canceled without notice to her and after it had been agreed between her and Miss Swannock that plaintiff should have the land, and also shows that she was in possession of the land April 21, 1904, and that she had been in possession for more than a year prior thereto.

The law as well as equity is with the plaintiff in this case. She took possession of the land more than a year prior to the 21st of April, 1904, when the act was passed giving the Dela-

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wares the right to sell the improvements upon their surplus holdings. In fact, her testimony is that she had been in possession much longer. The land had not been segregated by the Act of July 21, 1902. It was the purpose of section 23 of the act to preserve the rights of the Delaware Indians of the Cherokee Nation, but it was not the intention of Congress to delay the allotment of the Cherokees. It was intended to preserve the rights of the Delawares by segregation enough to fulfill the stipulations of their agreement with the Cherokees, but it was intended that the balance of the lands should be subject to allotment as soon as the rolls were completed. This segregation was to include lands selected and occupied by the Delawares. Outside of this segregation the land was subject to allotment. Doubtless the department would have reserved the particular tract from allotment had it been notified by Miss Swannock that she owned the improvements thereon. That was the rule of the department in all cases, even among members of the same tribe; but, where no notice was given and the land was filed, the certificate became conclusive after nine months, especially when the owner of the improvements did not desire to file in his name or the name of a member of his family. It cannot be believed that Congress meant by Act April 21, 1904, to deprive members of the Cherokee Tribe of allotments lawfully made by them on lands subject to allotment at the time it was allotted, and of which they had taken possession. The purpose was only to permit the Delawares to dispose of improvements of which they were in possession at the time the act was passed. It could not be an injustice to any one to permit the Delawares to dispose of improvements of which they had retained possession, but where they had, as in this case, surrendered possession of the unsegregated land, and had permitted it to be filed on by members of the Cherokee Tribe, great injustice might result, as in this case, by canceling the filing. Congress did not intend by Act April 21, 1904, nor by Act March 3, 1905, to disturb filings lawful at the time they were made. In this case the plaintiff had not perpetrated a fraud on any one. The land was not segregated for the Delawares. She took possession without any objections from Miss Swannock, or any one repre-

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senting her, so far as appears from the record. She leased the land for oil and gas purposes, and her lease was approved by the department. Miss Swannock must have known that she was in possession by her lessee, but never at any time objected to the possession of the lessee. If she had any rights under the Act of 1902, she should have asserted them before the expiration of nine months from the time of filing. Of course, if the plaintiff had concealed her filing until after the expiration of nine months, a different question might arise. When the certificate was issued and the nine months had elapsed, the certificate was conclusive except for fraud. In *Ballinger v. Frost*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464, Mr. Justice Brewer said:

“Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation. It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them in common. They were the principal beneficiaries, and their title to the land they selected should be protected against the efforts of outsiders to secure them. White men settling on town sites were not the principal beneficiaries. Congress, it is true, authorized town sites, and the town of Mill Creek was established in compliance with the statute. It further provided for an enlargement of any town site upon the recommendation of the Commission to the Five Civilized Tribes. That recommendation was made in respect to the town of Mill Creek, but disapproved by the Secretary of the Interior. Thereafter the relator selected the land in controversy, a tract of 40 acres, on which were her improvements. Notice was given as required, and the time in which contest could be made—nine months—elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of see-

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ing that a patent was duly executed and delivered.”

In *Garfield v. U. S. ex rel. Goldsby*, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168, which was a mandamus proceeding to compel the Secretary of the Interior to replace on the rolls a person who had been enrolled and whose name the Secretary had stricken from the rolls without notice to him, Mr. Justice Day said:

“By the conceded action of the Secretary prior to the striking of Goldsby’s name from the rolls he had not only become entitled to participate in the distribution of the funds of the nation, but by the express terms of section 23 of the Act of July 1, 1902 (32 St. at L. 641, c. 1362), it was provided that the certificate should be conclusive evidence of the right of the allottee to the tract of land described therein. We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any act of Congress.”

The recent case of *U. S. ex rel. Knight v. Lane*, 228 U. S. 6, 33 Sup. Ct. 407, 57 L. Ed. 709, decided March 17, 1913, was a mandamus proceeding to compel the Secretary of the Interior to issue a patent. In that case application to cancel a filing was made within 30 days after the filing, and the person whose filing was canceled had notice and appeared at the hearing. The mandamus was refused, but in the course of the opinion Mr. Justice Van Devanter said:

“The decisions in *Garfield v. United States*, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168, are not in conflict with the views here expressed. In the former the writ was awarded to compel the respondent to erase and disregard an entry which he arbitrarily and without notice had caused to be made upon a public record, thereby beclouding the relator’s right to an Indian allotment. In the latter the writ was awarded to compel the delivery of a patent which was withheld solely through the unauthorized action of the Secretary in entertaining and sustaining a proceeding in the nature of a contest after the expiration of the time limited by statute for instituting such a proceeding.”

See, also, *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716, as to the effect of an allotment certificate. Unless the plaintiff recovers in this case, a grave injustice will be done. Not only did she file on the land, but long after the nine months for con-

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test had expired she leased the land for oil and gas purposes. This lease was approved by the Secretary of the Interior, and the lessee entered on the land without objection from Miss Swannock. In fact, a reading of the entire record leads to the conclusion that she was willing for the plaintiff to have the land. The fact that she subsequently gave a bill of sale has very little significance. She knew nothing of the technical descriptions. The lessee bored wells and paid the plaintiff \$2,100 in royalties which she now owes some one if her allotment was rightfully canceled. The department took the position that plaintiff and Miss Swannock could not lawfully make any agreement about the improvements, and that, if plaintiff paid \$200 for permission to file the improvements, she obtained no rights thereby, for the reason that the improvements had not been valued as required by the act. But it would seem the improvements were subsequently valued at \$12 and sold for that. It would seem that the maxim "*De minimis non curat lex*," would almost be sufficient to prevent the canceling of an allotment and the destruction of vested interests, such as existed in this case for so slight a consideration. The holding that she could not for sixteen times their value give plaintiff the right to file on her improvements without complying with the regulations of the department, but when she had complied could give the right to another for an insignificant sum, is simply in line with the policy of the department, which, though probably necessary, has made it so extremely unpopular in the Indian Territory.

The judgment should be affirmed.

By the Court: It is so ordered.

BOARD OF MEDICAL EXAMINERS OF OKLAHOMA
et al. v. GULLEY.

No. 2907. Opinion Filed October 14, 1913.

Rehearing Denied December 9, 1913.

(136 Pac. 1083.)

1. **MANDAMUS—Petition—Sufficiency.** A petition in mandamus to be sufficient, when challenged by demurrer, must contain allegations of fact which, taken as true, affirmatively show that the person sought to be mandamused is under the clear legal duty of doing the thing it is sought to compel him to do.
2. **SAME—Physicians and Surgeons.** Petition examined, and held insufficient.
3. **PHYSICIANS AND SURGEONS—Right to License Without Examination.** Under section 39, art. 5, of the Constitution (Williams' Ann. Ed.), a physician who had been practicing medicine in Oklahoma Territory under a territorial license is not entitled, as a matter of right, to registration since statehood without examination, where it is shown that on September 12, 1907, the territorial Supreme Court had affirmed the decision of the district court, in a suit brought by the territory, canceling and annulling the territorial license under which such physician had been practicing on the grounds of fraud and deceit in procuring the same, and no other license had been issued him.

(Syllabus by Brewer, C.)

Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.

Mandamus by Calvin D. Gulley against the Board of Medical Examiners of the State of Oklahoma and others. A demurrer to the petition was overruled, and defendants bring error. Reversed.

Chas. West, Atty. Gen., for plaintiffs in error.

John A. Remy, for defendant in error.

Opinion by BREWER, C. This is a suit in mandamus to compel the state medical board to issue a license to the plaintiff below, Calvin D. Gulley, to practice the profession of medicine.

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The summary of what the petition states for cause of action, as set out by the Attorney General, and which defendant in error admits is substantially correct, follows:

"This action was begun by the defendant in error on April 28, 1910, by filing his petition in the district court of Oklahoma county, in which he alleged: That he was then and had been for a period of more than nineteen years a practicing physician, and a resident of the territory of Oklahoma and the state of Oklahoma for more than nine years. That by act of the first state Legislature a State Board of Medical Examiners was created. That for more than six years prior to the enactment of said law and the organization of said board he was a practicing physician in the territory of Oklahoma. That on the 7th day of November, 1896, he was graduated and received a diploma from the Independent Medical College of Chicago, Ill., and also graduated from the Metropolitan Medical College of Chicago, Ill., on October 12, 1899. That no charges were made against him except in a proceeding which resulted in a decision by the Supreme Court of the territory of Oklahoma on September 12, 1907, affirming a decision of the district court of Logan county, revoking the license theretofore issued to him to practice medicine in the territory of Oklahoma by the territorial board of health of said territory of Oklahoma. That since statehood the Oklahoma State Board of Medical Examiners have licensed other physicians from the same schools of medicine from which the plaintiff (defendant in error) was graduated, which physicians held the same credentials as those held by him (Gulley). That he made application to said board for a license, which was refused. That at the same legislative session at which the act creating said State Board of Medical Examiners was passed there was also passed a resolution directing said State Board of Medical Examiners to correct any injustice that may have been done any applicant of any school of medicine, and to restore to practice any one who, by mistake or otherwise, had been deprived of the right to practice his or her profession, without further cost or examination, and that all physicians who had been granted license to practice medicine previous to statehood, regardless of school or schools, should be placed upon an equal footing with the graduates of the same school, who had been granted a license by the State Board of Health, or the Board of Medical Examiners, which resolution was approved by the Governor. That subsequent to the passage of such resolution he again applied to the State Board of Medical Examiners for a license to practice medicine, but that de-

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defendants again refused and still refuse to grant said license. The petition concluded with a prayer for mandate directing the officers and members of said board to execute, issue, and deliver to the plaintiff (defendant in error) a license permitting him to engage in the practice of medicine, and for costs and other proper relief."

A demurrer to the petition was interposed, setting up the following grounds:

"First. That this court has no jurisdiction of the person of the defendants. Second. That this court has no jurisdiction of the subject of the action. Third. That the plaintiff has no legal capacity to sue. Fourth. That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants, or any one of them."

This demurrer was overruled, and the defendants below, electing to stand on the same, have appealed to this court on the question of the sufficiency of the petition in mandamus.

We can still further boil down the averments of the petition, when measuring its charging portions, to see if the plaintiff is entitled, as a matter of legal right, to have the court compel the board to issue him a license. To obtain such relief, it must appear affirmatively that, under the facts pleaded and the law, it was the legal duty of the board to license him. His averments amount to this: (1) That for more than six years prior to the passage of the Act of 1907-08 creating the medical board he was a practicing physician in Oklahoma Territory. (2) That he is a graduate of Independent Medical College of Chicago and the Metropolitan Medical College of Chicago. (3) That the only charges theretofore made against him resulted in the cancellation of his license by the territorial Supreme Court September 12, 1907. (4) That the board has licensed other practitioners who graduated from the same schools from which he graduated. (5) That he made application for a license, and was refused. (6) That he has some right (not very clearly defined) under a concurrent resolution of the Legislature of 1907-08. This allegation charges that an injustice has been done him (presumably by the court's decision referred to).

For the plaintiff to succeed, it must appear from the facts stated in the petition that he is entitled to registration and a license

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to practice medicine; the question of examination as to proficiency is not in this case. We are merely asked to declare, taking the facts stated as true, that the board was under the unqualified and imperative legal duty of issuing him a license.

First. Section 39, art. 5 (section 101, Williams' Const.), after providing for the creation of a board of health, says:

"All physicians, * * * now legally registered and practicing in Oklahoma and Indian Territory shall be eligible to registration in the state of Oklahoma without examination or cost."

If Doctor Gulley was a legally registered physician at the time of the creation of the state, then he is entitled to registration without examination. Was he? By specific mention in his petition he brings into his case a decision of the territorial Supreme Court rendered September 12, 1907. *Gulley v. Territory of Oklahoma*, 19 Okla. 187, 91 Pac. 1037. In this case it is made to appear that on February 11, 1902, Dr. Gulley had been licensed to practice medicine under the law in force in the territory of Oklahoma at that time, and later the territory, through its Attorney General, brought suit in the Logan county district court, upon direction of the Governor, to have the license canceled and annulled on the ground that it had been obtained through fraud and deception. The court sustained the contention of the territory, and an appeal was prosecuted to the Supreme Court, where the cause was affirmed, which resulted in the annulment and cancellation of his license to practice medicine in Oklahoma Territory. Inasmuch as the petition here makes no claim that after that judgment, and prior to statehood, he was again licensed, it is manifest that he can found no right to the relief sought under that provision of the Constitution, for the very simple reason that when statehood came he was not a legally registered and practicing physician.

The claim that plaintiff is entitled to registration because he is a graduate of, and held a diploma from, the Independent and the Metropolitan Medical Colleges of Chicago brings again into this case the decision of *Gulley v. Territory of Oklahoma, supra*. The basis and foundation of that suit was on the claim that these colleges were not legitimate medical schools, but were mere "di-

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ploma mills," that issued diplomas without a course of study, examination, etc., but merely for a financial consideration. On this point in the former case, the court, in the body of the opinion, says:

"It is also contended that the evidence is insufficient to sustain the finding and judgment of the court below. In our opinion the evidence fully sustains the allegations of fraud and deception in the procurement of the license, and we think that no other reasonable or just conclusion could have been reached by the trial court. The record discloses a flagrant case of fraud, deception, and misrepresentation in the procurement of the license. And this is not all. The applicant knew, at the time he made his application and verified the same, under oath, that he was not a graduate of a reputable medical college, within the meaning of this statute. He knew that the pretended diploma which he held from the college was a mere sham and fraud, well calculated to mislead and deceive the territorial board of health. He knew that the obtaining of the diploma was a mere pretense and fraud, and he knew that the Supreme Court of the state of Illinois had, long prior to his application for license to practice in this territory, forfeited the charter of this pretended medical college, and declared 'that the corporation is a mere diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice.'"

See *Independent Med. College v. People ex rel.*, 182 Ill. 274. 55 N. E. 345.

Under the law in force in 1902, under which the license was originally issued to plaintiff, he was entitled to be registered if he "was a graduate of a medical college," and without examination. He was so licensed or registered on presenting the diploma, and, as has been seen, this license was canceled, because the institution he claimed to be a graduate of was not a "medical college." He sets up his graduation and diploma from this same institution as a basis for demanding, without further inquiry by examination, a license under the law in force when this suit was filed, which provides:

Section 4248, Comp. Laws 1909:

"Every person before practicing medicine and surgery or any of the departments of medicine and surgery in this state, must have the credentials herein provided for. In order to procure such credentials, he must produce satisfactory evidence of

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good moral character and a diploma issued by some legally chartered medical school or college; the requirements of such medical school or college shall have been at the time of granting such diploma in no particular less than those prescribed by the American Association of Medical Colleges, or the Southern Association of Medical Colleges in that year in which the diploma was granted. Or he must show satisfactory evidence of having possessed such diploma or license from some legally constituted institution which grants medical and surgical licenses only on actual examinations, or satisfactory evidence of having possessed such license or diploma. He must accompany said diploma or license with an affidavit showing that he is the person therein named and that the diploma or license was procured in the regular course without fraud or misrepresentation of any kind, such affidavit to be taken before any person authorized to administer oaths. The same shall be attested under the hand and seal of such officer, if he have a seal. In addition to such affidavit, the board shall hear such information as in its discretion it may deem proper as to any of the matters embraced in said affidavits. If it should appear from the evidence that said affidavit is untrue in any particular, or if it should appear that the applicant is not of good moral character, the application must be rejected. * * *

The graduation and diplomas set up in this suit as a basis for demanding a license under the above law having been held fraudulent, and not coming from a medical college, in the former suit of plaintiff—this being the issue involved—that question was in that case finally settled. Those diplomas entitled him to nothing. Besides, even if there had been no former suit, the petition nowhere claims that the colleges mentioned meet the requirements or measure up to the standards required in the statute in force when this suit was brought and quoted above.

On the allegation that the board has licensed other practitioners who graduated from the same medical colleges he did, it is sufficient to say that such persons, for all we know and all the record shows, may have shown by examination that they possessed the necessary qualifications, and they may have held diplomas from some other college meeting the requirements of the law.

It is not entirely clear just what right plaintiff predicates on the concurrent resolution of the House and Senate referred to in the petition. It follows:

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"Whereas, it is claimed that by mistake or otherwise, injustice has been done physicians of certain school or schools of medicine, in the administration of the territorial laws governing the admission of such physicians to practice their profession, as well as in the attempt to cancel the license of those previously admitted to practice: Therefore be it resolved by the House of Representatives, the Senate concurring therein, that the State Board of Health or Medical Examiners be, and is hereby empowered, authorized and directed to correct any such mistake or mistakes and right any injustices that may have been done any applicant of any school of medicine for admission to practice, and restore to practice any one who, by mistake or otherwise, has been deprived of the right to practice his or her profession, without further cost or examination; that all physicians who have been granted licenses previous to statehood, regardless of school or schools, shall be placed on equal footing with the graduates of the same school, who have been granted license by the State Board of Health or Medical Examiners. This resolution is to be in full force and effect from and after its passage and approval. Approved April 2, 1908." (Laws 1907-08, p. 784.)

It is not necessary to discuss or determine what legal effect the above resolution has, for whether it has the force of law, or be merely advisory as expressing the legislative sentiment, it is not believed that it contains anything that can be said to confer on the plaintiff the legal right to registration. It might at first glance be argued that it affords a basis of support to the charge that other graduates of his college had been admitted, and therefore that he had, because of such fact, acquired the right of admission. But this result does not follow. The view we take of the resolution is that, where "school of medicine" is mentioned, it refers, not to a particular college or university in which medicine is taught, but to one of the great theories of medicine, such as allopathy, homeopathy, eclectic, etc.

It is not shown that an injustice has been done him in the Supreme Court decision mentioned so as to found a claim thereon that he comes under the resolution. And certainly, if such were the claim, the facts showing the injustice would have to appear, and then the board would have to determine whether or not the contention was true, if, indeed, the decision of the terri-

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torial Supreme Court could be set aside in such a way, which point it is unnecessary to discuss or decide. While the board is administrative and executive, and does not exercise judicial functions (*Jamieson v. State Board*, 35 Okla. 685, 130 Pac. 923), yet it has a discretion that it may exercise in the performance of many of its duties.

For the reasons given, the case should be reversed.

By the Court: It is so ordered.

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No. 3220. Opinion Filed November 11, 1913.

Rehearing Denied December 9, 1913.

1. **MASTER AND SERVANT—Defense—Acts of Independent Contractor.** A person cannot employ another person to do for him, as an independent contractor, an unlawful thing, and thus escape the consequences of the unlawful act when sued for damages occasioned thereby.
2. **DAMAGES—Measure—Destruction of Crop.** In a suit for damages for the destruction of a growing crop, such damages are to be estimated as of the time of the injury, and the measure to be applied is compensation for the value of the crops in the condition in which they were at the time of their destruction.
3. **SAME—Growing Crop—Determination of Value.** In arriving at the value of a growing crop, it is proper to show by evidence the probable yield under proper cultivation, and the value of such probable yield when matured, gathered, prepared, and ready for sale; also the probable cost of proper cultivation necessary to mature the crop, as well as the cost of its gathering, preparation, and transportation to market. The difference between such probable value in the market and the cost of finishing the cultivation, and gathering, preparing, and transportation to market will ordinarily represent the value at the time of loss with as much certainty as any other method.
4. **SAME.** The value of the labor bestowed on a growing crop in bringing it forward to the time of its wrongful destruction does not ordinarily afford either a sufficient or safe measure of the damages occasioned by its loss.
5. **RAILROADS—Injuries Incident to Construction—Damage to Crops—Animals.** In a suit for crop damage, wherein it is alleged that defendant railway unlawfully entered upon the land,

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and tore down and destroyed the fencing, thus permitting animals to destroy the crops, and the evidence of plaintiff shows that defendant, through persons acting for it, did break plaintiff's fence, and enter upon lands of which he was in the rightful possession, and because of such breaking of and leaving down the fencing the crops were destroyed, a *prima facie* case is made; and in the absence of evidence upon the part of defendant that it had acquired in some way a right of way over the land, and thereby had a right to break and enter, a verdict for plaintiff will not be disturbed.

(Syllabus by Brewer, C.)

Error from County Court, Bryan County;

J. L. Rappolee, Judge.

Action by Frank Brown against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones and J. C. Wilhoit, for plaintiff in error.

J. M. Crook, for defendant in error.

Opinion by BREWER, C. The defendant in error brought suit in the court below against plaintiff in error, as defendant, alleging in substance that he was in the legal possession of certain farming lands (described), and that on or about the 1st day of May, 1910, the defendant unlawfully entered upon said lands, destroyed and removed the fences inclosing said lands, and negligently left said lands and crops growing thereon subject to be destroyed by stock running at large in the neighborhood thereof; that on said date plaintiff had planted and had growing on said lands 25 acres of cotton; and that stock entered thereon, and totally destroyed the growing crop, which was of the value of \$125. The case was first tried in a justice of the peace court, where the plaintiff prevailed, and it was appealed to the county court, and plaintiff was awarded the full sum sued for. The railway company, as plaintiff in error, appeals.

Plaintiff in error complains: (1) That the demurrer to the plaintiff's evidence should have been sustained. (2) That plaintiff failed to prove damage. (3) That the actionable wrong and resulting damage, if any are shown, are the result of the acts of an independent contractor.

We will discuss the points in the order named.

(1) The evidence shows that in the spring of 1910 the agents of the railway came to plaintiff's farm, and cut a gap through the fencing, 75 or 100 feet wide, where the right of way entered, and also at the point where it left the farm; that these openings were left open, and through them cattle entered upon plaintiff's crops; that the plaintiff had broken up 25 acres of land, cross-harrowed it, listed it, and planted it to cotton with seed that cost 60 cents a bushel; at about the time cotton plants commenced coming up that large numbers of cattle entered in and upon the land through these openings, and totally destroyed the young cotton, actually eating all of it up. The defendant offered evidence to show that, where the fencing was cut at the right of way, it had erected temporary wire gates across the same to protect the crops; but there was much evidence that the openings made by the defendant remained open, and that cattle roamed onto plaintiff's lands at will for a long period of time. There was no evidence received or offered to show that the railway was the owner, through purchase or condemnation, of the right of way it appropriated through plaintiff's farm, or that it was entitled to possession, so as to give it the right to break and tear down the fencing.

The answer of the railway was a general denial. The specific issue thus tendered was whether or not defendant "unlawfully entered in and upon said land, destroyed and removed the fences inclosing said land," etc., thus causing through such unlawful acts the destruction of plaintiff's crops.

The evidence shows that the land belonged to Webb, and that plaintiff was a tenant in lawful and peaceable possession of the same, farming the land, and that defendant came, and through persons acting for or under its authority, without plaintiff's knowledge, broke and destroyed the fences, and deprived plaintiff of the value of his cotton crop.

The secretary of the defendant corporation was on the witness stand, but gave no testimony tending to show that it had any right to enter upon this farm, and tear down and leave down the fencing surrounding this crop. We think plaintiff's

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proof sufficient to require the defendant to justify its acts by showing a right to break and destroy the fence. This it has not done, notwithstanding the fact that one of its general officers was on the witness stand, and, if defendant had procured a right of way through this land by purchase or condemnation, he certainly would have said something about it under the issue being tried.

(2) The breaking of the fence and the exposure of the crops to the ravages of cattle being tortious, so far as the proof shows, the question of independent contractor cannot arise. A person cannot employ another to do for him, as an independent contractor, an unlawful thing, and thus escape the consequences of the unlawful act. 16 A. & E. Ency. of Law (2d Ed.) 203 (citing *Ellis v. Sheffield C. C. Co.*, 2 El. & Bl. 767; *Walker v. McMillan*, 6 Can. Sup. Ct. 241; *Barry v. Terkildsen*, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55; *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113; *Heidenwag v. Philadelphia*, 168 Pa. 72, 31 Atl. 1063).

(3) The contention that damages have not been legally shown rests upon the fact that plaintiff produced no witness who stated his opinion of the value of the growing cotton, in its then condition, at the time it was destroyed. The evidence of two witnesses showed that the breaking of the land was worth \$2, the cross-harrowing \$1.50, the bedding \$1, the planting with seed that cost 60 cents a bushel \$1, per acre, and that 25 acres of cotton just up was destroyed. Defendant produced a witness who estimated the value of these various items at an aggregate cost of about \$3 per acre. Under plaintiff's evidence the actual value of the labor in producing a stand of cotton was \$5.50 an acre, which, if sufficient evidence of value, aggregates a sum in excess of the verdict returned. Defendant's evidence would not have justified so large a verdict.

The plaintiff undertook to prove value, and asked this question: "What was the value per acre of that cotton at the time it was destroyed by cattle?" This question was objected to, and after that, without objection, both parties presented evidence of the cost of getting the crop in the condition it was in when destroyed. It seems to have been the idea of both sides that the

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value of the labor put on the crop would adequately represent the amount of damage in case the defendant was liable.

It is the general rule, as stated in *C., R. I. & P. Ry. Co. v. Johnson*, 25 Okla. 760, 107 Pac. 662, 27 L. R. A. (N. S.) 879, that "the damages are to be estimated as of the time of the injury, and that the measure thereof is compensation for the value of the crops in the condition in which they were at such time." In that case it is said:

"It is permissible as a means of arriving at the value of a growing crop to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market; the difference between the value of the probable crop in the market and the expense of maturing and placing it there in most cases will give the value of the growing crop with as much certainty as can be attained by any other method."

And in discussing the various ways of arriving at the value of a growing crop, the precise question presented here was in the mind of the court, but not necessary for decision. (Note *quaere* in syllabus.) The court, however, in that case quotes from *Col. Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62, as follows:

"But, in order to establish the value at the time of the destruction, courts are compelled to resort to several methods of computation, and either, or all combined, may afford a fair basis. One might be a year's rental value, with the cost of planting and bringing forward the crop until the time of its loss; another, what the crop would bring in its immature state at a sale; and a third, the proof of the average yield and the market value of crops of same kind planted and cared for in the same manner, less the cost of maturing, harvesting, and marketing. While neither would afford positive proof, they would all seem to be proper, and the only way by which a jury could get the necessary data upon which to base a verdict."

The above case seems to hold that the cost of bringing a crop forward to the time of its loss is permissible; but in *Chicago, etc., R. Co. v. Barnes*, 10 Ind. App. 460, 38 N. E. 428, this doctrine is squarely repudiated. In this state of the law we do not deem it wise to hold as a general proposition that the cost of

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bringing forward a crop to the time of its loss affords a proper measure of the damage for its wrongful destruction. The value of a growing crop at any certain period of its development depends upon its prospect of a yield and the probable value thereof, and many other factors may enter into and influence this prospect. Unusual and expensive labor may have been employed in preparing the ground for and bringing forward a crop; yet, through the vicissitudes of the weather, the ravages of insects, the failure to get a stand, or for many other reasons the value of the immature crop at the time of its loss may be in no way commensurate with the value of the labor bestowed upon it. On the other hand, a crop may be brought forward to the time of its loss with very small cost, and yet favorable conditions may have so affected it that it at the time gives promise of an abundant and valuable harvest, outreaching many times the expense theretofore put upon it. A general and ordinarily a just rule is clearly stated in *C., R. I. & P. Ry. Co. v. Johnson, supra*, and quoted herein, and, while the varying conditions under which this question will arise require liberal treatment by the court to meet the situation, yet in the main it is far safer and wiser for litigants to proceed along the plain highway, and not trust themselves to bypaths that often lead into the confusion of the wilderness.

However, as stated heretofore, it is very clear that these parties adopted and tried this question upon the theory that the cost of the labor plaintiff had expended on this crop would adequately and properly measure his loss, if defendant was in any event liable to him therefor. Each side offered evidence *pro* and *con* as to this cost without objection from the other. If they were satisfied at the time to so measure the loss, they ought not now be allowed to reverse a case for an error they assisted in making. It would probably be only under rare circumstances where a growing crop would not be worth at least the labor expended upon it. This does not take into account rental value or prospective profits, and it must certainly be true that under ordinary circumstances there is some profit in husbandry above the actual cost of labor. It does not appear to us that an unjust

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verdict has been rendered, and, so believing, we will hold the parties to the theory upon which they tried the case.

The judgment should be affirmed.

By the Court: It is so ordered.

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No. 3277. Opinion Filed November 11, 1913.

Rehearing Denied December 9, 1913.

(136 Pac. 1088.)

1. **SALES — Rescission of Contract — Fraudulent Representations.** False and fraudulent representations as to the quality, character, and grade of personal property, made by the agent of a vendor for the purpose of inducing a sale, justify a rescission of the contract of sale by the vendee, providing steps to rescind are taken within a reasonable time after the discovery of the falsity of such representations.
2. **SAME.** The purchaser of a piano, unacquainted with musical instruments and relying wholly upon the representations of the agent selling the same, and the character, grade, and quality of the piano being falsely and fraudulently represented to him, may rescind the contract, within a reasonable time after the discovery of the fraud that has been perpetrated upon him, by returning the piano to such agent.
3. **SAME—Reasonable Time—Question for Court.** What is a reasonable time for taking steps to rescind is a question of law for the court to determine under the evidence in each particular case.

(Syllabus by Galbraith, C.)

Error from County Court, Marshall County;
J. W. Faulkner, Judge.

Action by J. T. Couch against J. F. O'Brien to recover on two promissory notes. Judgment for defendant, and plaintiff brings error. Affirmed.

E. D. Slough, for plaintiff in error.

Wm. M. Franklin, for defendant in error.

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Opinion by GALBRAITH, C. This action was originally filed in the justice court, and on appeal to the county court was tried to the court and a jury, and judgment rendered for the defendant, and the plaintiff prosecuted an appeal to this court by petition in error and case-made.

The action was based on two promissory notes for \$87.50 each, alleged to have been given as the balance of the purchase money on a piano sold by the plaintiff in error to the defendant in error. The defendant in error acknowledged the purchase of the piano and the execution of the notes, but contends that there was a failure of consideration, and that the contract of sale had been rescinded by him; that he was led to rescind by reason of the fraud and misrepresentations of the plaintiff's agent, made to him at the time of the sale; that he was not a musician and not familiar with musical instruments, and did not rely upon his own judgment in the purchase of the piano, but relied entirely upon the representations of the plaintiff's agent as to the quality and value of the piano; that it was represented to him that this was a first-class instrument, and was of the value of \$500, and that on account of a special sale which the plaintiff was making it would be sold to him for \$300, and he believed such representations to be true, while, as a matter of fact, the same were false and were fraudulently made, and the piano was not new, although it had been newly varnished, but was a second-hand piano and had been through a fire and exposed to water and heat and was of an inferior quality, and was practically of little or no value whatever. When he discovered these facts, he rescinded the contract of sale by returning the piano to plaintiff's agent. The case was tried upon the issues thus made, and the jury found for the defendant, and gave him judgment for \$30, the cash payment he had made at the time of the purchase, and for costs.

The plaintiff in error assigns as error the overruling of his motion for new trial, and in this it is complained that the verdict is contrary to law and is not sustained by the evidence, and that the court erred in admitting certain evidence over the objection of the plaintiff in error, and also erred in the giving of an in-

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struction to the jury. The instructions are not numbered as they should have been, but the one complained of is set out in full in the record and was attached to the motion for new trial. In this instruction the court told the jury, in substance, that if they found from a fair preponderance of the testimony that the agent, Vaughn, fraudulently misrepresented the character and quality of the piano to the defendant, and told him that it was a standard instrument of the value of \$500, and ordinarily sold for that sum, and that the defendant was unfamiliar with pianos, but knew the agent, Vaughn, and had confidence in him and relied upon his statements as to the character and quality of the piano, and these representations were false, the defendant had a right to rescind the sale and return the instrument; that, while ordinarily the law placed the duty upon the defendant to inspect the article he was buying, and to rely upon his own judgment, if the defects were such that a man of ordinary prudence could not see and detect them readily, and he relied upon the representations of the plaintiff's agent as to the quality of the instrument, and these representations were false and fraudulent, and the piano was practically worthless, he had a right to rescind. This instruction is not technically correct. The chief vice in it was a failure to state that it was the duty of the defendant, under the law, to take steps to rescind the contract promptly upon the discovery of the fraud that had been perpetrated upon him in the sale; however, this defect in the instruction was cured by an instruction requested by the plaintiff and given by the court, as follows:

"Where a party wishes to rescind a contract, they must do so immediately upon the discovery of the defects complained of."

The law is well settled in this jurisdiction that false and fraudulent representations made to induce a sale are grounds for rescinding a contract of sale by the vendee. *National Bank of Anadarko v. Oldham*, 26 Okla. 139, 109 Pac. 75; *Robinson v. Roberts*, 20 Okla. 787, 95 Pac. 246.

It is also held that a vendee wishing to rescind a contract of sale should return the article purchased to the vendor within a reasonable time; and it is also held that what is a reasonable

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time for rescinding a contract of sale, under the facts of each case, is a question of law for the court to determine. *Luger Furn. Co. v. Street*, 6 Okla. 312, 50 Pac. 125.

The testimony shows that the defendant discovered some defects in the piano within a few days after it had been delivered at his house, but that the material defects did not appear for some three, or four, or five weeks afterwards. He said:

"I discovered it was cracking, and it showed to have been worked over and I notified Mr. Vaughn about it, and told him that it wasn't what it was represented to be. I said it wasn't what it was represented to be and I did not want it, and that it wasn't any account and I did not want it. Q. It began to crack and checker? A. Yes, looked like where you would put paint on the hot side of a house, that is when I turned it back to him."

We have examined the instructions given to the jury by the court, and, as a whole, they seem to fairly state the law involved in the case. The one complained of, taken in connection with the other instruction given by the request of the plaintiff, cannot be said to be so clearly prejudicial as to justify the court in reversing the judgment appealed from.

The question of whether or not the representations made by the plaintiff's agent at the time of the sale of the piano were false and fraudulent was a question of fact that was properly submitted to the jury for determination. If they were made, as contended by the defendant in error, they were sufficient to authorize a rescission of the sale, providing, of course, the defendant in error acted with reasonable promptness in rescinding the contract after the discovery of the fraud that had been perpetrated upon him. The jury, by their verdict, determined this question in favor of the defendant in error. The court in denying the motion for a new trial passed upon the question of law as to whether or not the defendant in error had exercised the right to rescind within a reasonable time, as it was his duty to do under the law. There can be no serious question, from an examination of the testimony in the record, about there being sufficient evidence to sustain the findings of the jury. The rule is well settled in this jurisdiction that where questions of fact are

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submitted to the jury, under proper instructions, and there is evidence to support the finding, the verdict will not be set aside.

Complaint is made that the court erred in permitting the agent of the plaintiff to testify as to the price at which the piano had been consigned to the plaintiff by the general dealer, he testifying that the consignor had told him that it was invoiced to the agent at \$90. It seems that this was material testimony as affecting the issues of fraud involved in the case, and its admission was not error.

None of the assignments of error seem to be well taken. We see no good reason for disturbing the judgment appealed from, and therefore conclude that it should be affirmed.

By the Court: It is so ordered.

ATCHISON, T. & S. F. RY. CO. v. ST. LOUIS & S. F. R.
CO. *et al.*

No. 1423. Opinion Filed June 19, 1913.

Rehearing Denied December 17, 1913.

(135 Pac. 353.)

1. **CARRIERS—Delay of Shipment—Liability of Initial Carrier.** In an action against both the initial and terminal carrier for damages caused by negligent delay, although the initial carrier has notice of the importance of prompt delivery, and that loss of profits would result from delay, where all the delay is shown to have been on the terminal line, then, in the absence of statute or contract to such effect, the initial carrier will not be held liable for any of the damages resulting, although it may have failed to deliver such special notice, unless it appears that such delay was the proximate result of the failure to deliver such notice.
2. **NEGLIGENCE—Proximate Cause—Burden of Proof—Question for Jury.** Damages, to be recoverable for negligence, must appear to be the proximate result of the negligence shown, and the question as to what is the proximate cause of an injury, or what is the immediate or proximate result of a given act, is generally one of fact for the jury.
3. **CARRIERS—Delayed Shipment—Proximate Cause—Question for Jury.** In an action against two carriers for damages, where it appears that each has been guilty of separate acts of negli-

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gence, and that plaintiff has sustained damages, but there is an issue of fact as to which carrier's negligence was the proximate cause of the injury, and where such fact can be determined only from the evidence and circumstances of the case, an instruction which takes such fact from the jury is erroneous.

(Syllabus by Harrison, C.)

Error from District Court, Washington County;

T. L. Brown, Judge.

Action by the Sun Drilling Company against the Atchison, Topeka & Santa Fe Railway Company and another for damages. From a judgment against it, the Atchison, Topeka & Santa Fe Railway Company brings error. Reversed and remanded.

Cottingham & Bledsoe, George M. Green, and Devereux & Hildreth, for plaintiff in error.

Montgomery & O'Meara, for defendants in error.

Opinion by HARRISON, C. This action was begun by plaintiff, the Sun Drilling Company, in the United States Court for the northern district of the Indian Territory at Bartlesville on May 18, 1907. After statehood the cause was transferred to the district court of Washington county, and was tried in February, 1909, and judgment rendered upon the following verdict, to wit:

"We, the jury impaneled and sworn in the above entitled cause, do upon our oaths find for the plaintiff and against the Atchison, Topeka & Santa Fe Railway Company, and fix plaintiff's recovery at \$1,200, and further find in favor of the St. Louis & San Francisco Railroad. John F. Algeo, Foreman."

From the judgment on this verdict and order overruling motion for new trial, the Atchison, Topeka & Santa Fe appeals, making the St. Louis & San Francisco a party defendant in error, and alleging ten separate grounds for reversal.

The material facts are substantially as follows: The Sun Drilling Company was a corporation organized for the purpose of drilling for oil and gas. It had contracts for drilling wells in the vicinity of Bristow. It had a string of drilling tools at Bartlesville, and sought to ship same to Bristow, where the drilling

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contracts were awaiting. The string of tools was loaded for shipment at Bartlesville on the Santa Fe Railway. At the time they were loaded for shipment, and in fact before they were loaded, the shipper notified the agent of the Santa Fe at Bartlesville of the nature of the shipment, the character and purpose of the string of tools, and that it had contracts for drilling wells in the neighborhood of Bristow, which were then waiting to be fulfilled, and that the shipper would sustain loss by any delay in the shipment. Thereupon, with full notice of the purpose of the string of tools, and of the importance of a prompt shipment, and of the fact that the shipper would sustain damage by each day's delay in shipment, the Santa Fe contracted to deliver the tools over its lines and its connecting lines to Bristow. The goods were shipped by the Santa Fe without delay, and with reasonable promptness, and delivered to its connecting carrier, the St. Louis & San Francisco, at Tulsa. But, while the shipment was delivered in good order and without delay to the Frisco, the Santa Fe failed to impart to the Frisco the special notice it had as to the character and purpose of the shipment, and as to the contracts which the shipper had in waiting at Bristow, and that special damage would result from any delay in shipment. The Frisco took charge of the shipment; but, instead of delivering them promptly at Bristow, the goods did not reach Bristow, or at least all of them did not, for about 45 days thereafter. It seems that the goods were separated and put into different cars by the Frisco, and one car with a portion of the tools was delivered at Bristow within eight or ten days; but the other car with the remainder of the tools was lost on the route, and delayed for about 45 days, during which time the shipper was unable to work at its contracts, but was compelled by reason of not getting a portion of the tools to remain idle during the time, and during the time it was unable to procure like tools at Bristow, and made no effort to procure them from other places, for the reason that they were making daily inquiries of the Frisco as to when the tools would probably be delivered, and were being daily informed by the Frisco that they were expecting the tools any day. The action was brought against both companies for the

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damages resulting, and recovery sought upon the theory of joint negligence of both, and the concurrent negligence of each. Suit was brought for \$2,000, and a verdict obtained for \$1,200.

The Santa Fe, plaintiff in error, contends that the judgment against it is erroneous, and ought to be reversed, for the reason that the shipment was made under a written contract which limited its liability to its own lines, and which provided that its liability should cease upon delivery in good order to a connecting line, and that the evidence shows conclusively that the delay all occurred on the connecting line, the Frisco, and that whatever damage may have been sustained was the result of such delay, and that the Santa Fe should not be held liable. On the other hand, the Sun Drilling Company contends that the delay on the Frisco line was caused by the failure of the Santa Fe to deliver the special notice as to the character and purpose of the shipment, and that therefore the Santa Fe is liable for all the damage sustained. The trial court took this view of the case, and in paragraph 4 instructed the jury as follows:

"Instruction No. 4. If the defendant, the Atchison, Topeka & Santa Fe Railway Company, failed to communicate to the connecting carrier, the St. Louis & San Francisco Railroad Company, the information referred to in instruction No. 2, then you should find for the plaintiff against the defendant, the Atchison, Topeka & Santa Fe Railway Company, even though you may believe that it is guilty of no other negligence in delivering the articles to the connecting carrier."

Now, let it be borne in mind that the shipment in question is purely a local shipment, and that therefore the rule which makes the initial carrier liable for all damages in interstate shipments is in no wise applicable.

It is very evident from the record that the jury followed the foregoing instruction literally. Hence we are brought to the one decisive question whether an initial carrier, for failure to deliver special notice as to the shipment, shall be held liable for all damages sustained, whether such damages be the proximate result of the failure to deliver such notice or not. We do not take this view of the law. Nor have we been able to find where any other court of last resort has taken such view. Plaintiff in error boldly

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asserts that no case announcing such doctrine can be found, and defendant in error has failed to cite any case in point, and, although we have made a diligent search, we have been unable to find a case exactly in point. Many authorities, it is true, as in *Illinois Central Railroad Co. v. Southern Seating & Cabinet Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933, 6 Am. & Eng. (2d Ed.) 626, and authorities cited in notes, seem to hold that, for failure to deliver special instructions to a connecting carrier, an initial carrier is liable for all damages sustained. But an examination of such cases shows that most of them are cases where the special instructions in question were instructions as to a particular route, rather than notice as to prompt delivery, and that, by failing to give such instructions, or by violating same, and misrouting the shipment, the delay occurred, and the damage resulted. In all such cases, however, the damages sustained are plainly the direct and proximate result of the failure to deliver the instructions as to route. Other authorities would appear to hold the initial carrier liable for failure to deliver such instructions, notwithstanding the contract which limits liability to its own lines; but such decisions are based either upon statutes which expressly make the initial carrier liable for all damages, with a right of recovery against the connecting carrier for the damage caused by it, as in Texas, South Carolina, and other states, or are cases where the damages are clearly the proximate result of the failure to deliver the special instructions. But we have been unable to find any case where the initial carrier has been held liable for the whole damage for failure to deliver a special notice of the character of the notice in question here, and where the shipping contract with the initial carrier specifically provides, as in the case at bar, that its liability should be limited to its own lines, and should cease upon delivery in good order and without delay to a connecting carrier, and where such contracts are not prohibited by law, as was the case when this shipment was made, and where the record fails to show that the damages sustained were the proximate result of the failure to deliver such notice, which is also true in the case at bar.

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The record plainly shows two of the elements necessary to recovery, namely, negligence and damage. It shows that two days was a reasonable time for the delivery, and that there was a delay of 45 days, without any valid excuse for such delay. It shows that the shipper was damaged by reason of the delay. The problem, therefore, is to locate the negligence, fix the liability, and estimate the damage. Now, it appears from the record that each carrier was guilty of some negligence. The Santa Fe for failure to deliver the notice as to the importance of prompt delivery, and the Frisco for failing to discharge its legal obligations to deliver within a reasonable time regardless of notice. Neither carrier is liable unless the negligence of one or the other was the proximate cause of the detriment suffered, and each is liable for the damage proximately resulting from its separate independent negligence, or both liable for concurring acts of negligence.

"The maxim '*In jure non remota causa sed proxima spectatur*' is Englished in Bacon's constantly cited gloss: 'It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' Liability must be founded on an act which is the 'immediate cause' of harm or of injury to a right." (Webb's Pollock on Torts, pp. 30, 31.)

"It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote, cause." (Cooley on Torts [3d Ed.] 99.)

See, also, Addison on Torts, 6.

"Liability for conduct does not attach, unless the conduct was the legal cause of the injury complained of." (Jaggard on Torts, 61.)

Street on Foundations of Legal Liability, p. 109, vol. 1, says:

"The law on this subject proceeds from a general principle running through the entire law of tort to the effect that always

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before liability can arise it is necessary that a causal relation, such as the law recognizes as being sufficient, should exist between the damage which is complained of and the act which occasions the damage. If such a relation does not exist, the damage is said to be remote, and cannot be recovered in any form of action. If such a relation does exist, then the damage is said to be a proximate result of the wrongful act to which it is attributed, and, conversely, the wrongful act is said to be the proximate cause of the damage. The terms 'proximate' and 'remote' are thus respectively applied to a recoverable and nonrecoverable damage."

Also, 13 Cyc. 25; 8 Am. & Eng. (2d Ed.) 614, and authorities cited in notes.

Now the decisive question under the evidence and the provisions of the shipping contract was, Which carrier's negligence was the proximate cause of the damage? Was all the delay and damage the direct and proximate result of the Santa Fe's failure to deliver the special notice, or was it all or partly the result of the Frisco's failure to discharge its plain legal obligation without any special notice to deliver the shipment without unreasonable delay? This was a question to be determined from all the facts and circumstances of the case, and we think under the facts and circumstances disclosed by the record the court erred in eliminating this question from the jury in the foregoing paragraph of its charge.

"The question as to what is the natural or proximate cause of a loss, or what the probable or immediate consequences of a given act, has been generally held one of fact for the determination of a jury; a question which is, ordinarily, not one of science or legal knowledge, but is for the jury to determine in view of the accompanying circumstances, and in accordance with common sense and understanding." (8 Am. & Eng. 581.)

"The matter is usually one of evidence, which should be left to the decision of the jury." (13 Cyc. 27, and authorities under note 64.)

The jury could determine which carrier was liable, or whether either or both were liable, only by determining from the evidence what was the proximate cause of the damage, and the question of proximate cause, the basic principle of recovery, was taken away from the jury in the foregoing instruction. The record does not show that the verdict was for special damages arising

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from lost profits, nor does it show that the entire 45 days' delay and the consequent ordinary damages were all the direct result of the Santa Fe's failure to deliver the notice. Regardless of any special notice, the Frisco was under a legal obligation to forward the shipment without unnecessary delay, and under the shipping contract, no matter what the special notice may have been, it would have been required to do no more. It would not have been required to change its regular schedule of trains, nor send out a special train, nor to discriminate against other freight ready for shipment. The Santa Fe had a right to assume that the Frisco would discharge its legal obligation to forward the shipment without unreasonable delay, and under the shipping contract it had no authority to impose any greater obligation on the Frisco. Hence, if it could impose no greater obligation by the special notice than that already imposed by law, and the record should show that the Frisco violated its legal obligation by an unreasonable and inexcusable delay, the law will not hold the Santa Fe liable for all the damages sustained, unless it be shown that all the delay was caused by the failure to give the notice. This was a question to be determined by the jury under proper instructions, and from all the facts and circumstances in the case.

The judgment should, therefore, be reversed, and the cause remanded.

By the Court: It is so ordered.

FIRST NAT. BANK OF LAWTON *et al.* v. THOMPSON.

No. 2360. Opinion Filed December 20, 1913.

(137 Pac. 668.)

1. **SET-OFF AND COUNTERCLAIM** — Action in Tort—Bills and Notes—"Set-Off." Under the statute which limits the use of a set-off thus, "A set-off can only be pleaded in an action founded on contract, and it must be a cause of action arising upon contract or ascertained by the decision of a court," a defendant, when sued in tort for damages for the wrongful conversion of a span of mules, cannot use a note given by plaintiff to a stranger to the suit, assigned to defendant, as a set-off.
2. **SAME**—"Counterclaim." Neither, in such suit, can the notes be used as a counterclaim, under a statute providing that "a counterclaim * * * must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action," where the note does not arise out of, and is in no way connected with, and has no relation to, the contract or transaction made the basis of plaintiff's suit, and which does not come under certain exceptions mentioned in the statute.
3. **SAME.** Neither can such note be set up, in such suit, as a basis for affirmative relief, when it is not concerning the subject of plaintiff's action, is in no way related to or connected therewith, and where it is not necessarily or properly involved in the action for a complete determination thereof, or settlement of the questions therein involved.
4. **TROVER AND CONVERSION**—Measure of Damages—Right to Elect. In a suit for damages for the conversion of a span of mules, ordinarily the measure of the damages is the fair market value of the mules at the time and place of the conversion, together with lawful interest thereon, and a fair compensation for the time and money properly expended in pursuit of the property. However, if plaintiff has prosecuted his suit with diligence, he can elect to have as his damages the highest fair market value of the property at any time between the conversion and the verdict, without interest, together with proper cost of pursuit.
5. **APPEAL AND ERROR**—Cure of Error—Evidence—Elements of Damage. An error in the improper admission of evidence as to nonrecoverable elements of damage is cured when the court's instructions forbid a recovery of any sum on account of such improper elements.

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6. **SAME — Harmless Error — Verdict — Rendition.** In a suit commenced prior to statehood, though tried after the erection of the state, the parties were entitled, as a matter of law, to a unanimous verdict of the jury, and an instruction that nine of the jury concurring could return a verdict was erroneous; but, where the verdict notwithstanding such instruction was unanimous, it was error without injury.

(Syllabus by Brewer, C.)

*Error from District Court, Comanche County;
J. T. Johnson, Judge.*

Action by F. F. Thompson against the First National Bank of Lawton and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Stevens & Myers and T. B. Orr, for plaintiffs in error.

W. E. Earl, for defendant in error.

BREWER, C. F. F. Thompson, defendant in error, as plaintiff below, brought this suit against the First National Bank of Lawton and Chas. C. Hammonds, as sheriff, to recover damages for the unlawful conversion of a span of mules, alleging that the defendant Hammonds, as sheriff, had taken them under a writ of attachment, issued and running against persons other than the plaintiff. The defendant Hammonds filed a general denial for answer. The defendant bank alleged that it was an attachment creditor of one J. W. Morrison, and that the mules sued for were in fact the property of the judgment debtor, and that the plaintiff, Thompson, had confederated with such judgment debtor to wrong, cheat, and defraud defendant, and to make the false claim that the property belonged to plaintiff, while in fact it belonged to Morrison, and was subject to the attachment, and therefore properly taken. The bank then proceeded to set up what it denominates a counterclaim, and, to support same, alleged in substance that the plaintiff did, on the 1st day of December, 1906, make, execute, and deliver to the said J. W. Morrison his certain promissory note in the sum of \$1,100, whereby the said Thompson agreed to pay to the said Morrison or order the said sum of \$1,100 for value received, with interest at the rate of 10 per cent. per annum from date until paid, on or before the

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1st day of December, 1907; that the said Morrison, being desirous of securing a loan from the bank, executed the note upon which the attachment in plaintiff's petition complained of was executed, and among other things as collateral to said note at the time of the execution thereof, did sell, assign, transfer, set over, and deliver unto the bank the aforesaid note, and thereby the said bank became and is now the owner and holder thereof; that the plaintiff has failed and refused to pay said note or any part thereof as requested so to do; and that, by reason of the premises, plaintiff now owes the bank the sum of \$1,100, with interest. The counterclaim closes with a prayer for judgment against the plaintiff for that sum and costs. The plaintiff attacked this counterclaim by demurrer, the overruling of which he objected to, and filed unverified reply. The cause was submitted to a jury, and a verdict was rendered in favor of the plaintiff in the sum of \$500, with interest thereon from the time of conversion of the mules. From a judgment founded on this verdict, the defendants below appeal to this court on properly certified case-made.

The first point urged for reversal is:

"The court erred in overruling a motion of the plaintiffs in error for a continuance of said case."

The continuance mentioned was asked for in the middle of the trial on the ground of surprise, and arose in this way: After the plaintiff had testified in the case, and had later been recalled, and was being cross-examined by defendant, he was shown the note by defendant's counsel, and asked: "You owed Morrison a note at that time for \$1,100, didn't you?" This was objected to by plaintiff's counsel as not proper cross-examination. The court replied that it was not proper cross-examination, but that plaintiff would be a competent witness, and the following examination was had:

"Q. Is that your signature? A. It is not. Q. That is not your signature? A. It is not. Q. Do you know who wrote that on there? A. I do not. Q. You don't know who wrote that on there? A. No, sir; I do not. I never saw it before. Q. Never seen that before? A. I didn't."

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After completing a lengthy cross-examination, and hearing another witness, counsel for the bank asked for a continuance on the ground of surprise, and based the same upon the testimony he had brought out, over objections from the plaintiff, relative to the execution of the note. It will be noted that the defendant brought out this evidence, not as proper cross-examination, but as its own evidence on its counterclaim, and defendant insists that, inasmuch as its counterclaim declared on a written obligation, and the reply thereto was unverified, therefore the execution of the instrument was admitted, and plaintiff could not deny the same. Of course this is ordinarily true under our statute (section 5648, Comp. Laws 1909 [section 4759, Rev. Laws 1910]) and the decisions construing same (*G. & W. R. Co. v. Rhodes*, 19 Okla. 21, 91 Pac. 1119, 21 L. R. A. [N. S.] 490; *Commonwealth Nat. Bank. v. Baughman*, 27 Okla. 175, 111 Pac. 332; *Railway Co. v. Cake*, 25 Okla. 227, 105 Pac. 322; *St. L. & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470); but, as we view this phase of the case, it is hardly necessary to discuss the rather peculiar situation presented in the record, for we do not believe that the counterclaim as alleged herein was available to defendant, either as a counterclaim or a set-off, or as relief sought.

It may be well to consider, somewhat in detail, what is proper to assert by a defendant when sued. Under section 4745, Rev. Laws 1910, an answer shall contain, first, a general or specific denial; second, a *defense, counterclaim, set-off, or a right to relief concerning the subject of the action*; third, these defenses of counterclaim, set-off, or for relief, may be either legal, equitable, or both. They must refer in an intelligible manner to the cause of action they are intended to answer.

Section 4746, Rev. Laws 1910, defines and applies the terms used above thus:

"A counterclaim * * * must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and *arising out of the contract or transaction* set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action. * * *" (Italics ours.)

Certain exceptions, expanding the rule in cases of wrongful attachment when set aside, and giving an individual defendant the right, whether it exists in his codefendant or not, need no critical examination at this time.

On the question of affirmative relief by defendant, it is said:

"The right to relief concerning the subject of the action mentioned in the same section *must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the questions involved therein.*" (Italics ours.)

Section 4747, Rev. Laws 1910, limits the use of a set-off thus:

"A set-off can only be pleaded in an action founded on contract, and it must be a cause of action arising upon contract or ascertained by the decision of a court."

The answering defendant denominates his plea a counterclaim; but the court must test a pleading by its averments, and a mere name applied to it will not alone determine its character. *Brown v. Massey*, 19 Okla. 487, 92 Pac. 246; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Kimball v. Connor*, 3 Kan. 414. This part of the answer certainly cannot, technically speaking, be classed as a counterclaim. It does not arise out of the transaction—the tort of converting the mules—which is not only the foundation of but is all of plaintiff's cause of action, nor is it in any way connected with the subject of plaintiff's action, nor does it fall within any exception named in the statute. Pomeroy's Code Remedies (4th Ed.) 618 *et seq.*; *Allison v. Shinner*, 7 Okla. 272, 54 Pac. 471; *Wyman v. Herard*, 9 Okla. 35, 59 Pac. 1009.

It cannot avail as a right to relief, because it is not concerning the subject of plaintiff's action, nor is the right to relief necessarily or properly involved in the action for a complete determination or settlement of the questions involved. The defense pleaded has not, in the remotest degree, any connection or relation to the cause of action, or subject of the action, or transaction, upon which plaintiff's action is founded.

It cannot be used as a set-off, under the Code, for the simple reason that it is based on contract, and the cause of action sued on is purely a tort, in no sense growing out of or founded upon

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a contract or breach of one. In *Kennett v. Fickel*, 41 Kan. 212, 21 Pac. 93, it is said:

"The first point made is that the court erred in striking out all of Kennett's answer except a general denial. This answer consisted, first, of a general denial, and second, a cause of action upon a promissory note alleged to have been executed by George W. Fickel and Catharine E. Fickel, which was pleaded by way of set-off. In pleading the set-off, it was incidentally stated that George W. Fickel had an interest in the property, and also that one Henry Perry claimed to be the owner, and had replevied the same from Kennett, which action was still pending and undetermined. He asked that both of these parties be brought in, and for judgment upon his promissory note for the sum of \$247, and interest thereon. The court ruled correctly in striking this count from the answer. The second cause of action, setting forth a set-off, cannot be pleaded as a defense in an action of replevin. Such an action is founded upon the tort or wrong of the defendant, and not upon contract; and section 98 of the Code specifically provides that 'a set-off can only be pleaded in an action founded on contract.' If either of the parties named owned and had the right of possession to the property, and the plaintiff wished to rely upon that fact, he could have shown it under the general denial. *Wilson v. Fuller*, 9 Kan. 176; *Yandle v. Crane*, 13 Kan. 344; *Bailey v. Bayne*, 20 Kan. 657; *Holmberg v. Dean*, 21 Kan. 73."

Neither can a tort be set off against a suit on contract, except it be within the exceptions named in our statute. In the case of *Carver v. Shelley*, 17 Kan. 474, it is said by Valentine, J.:

"(2) The defendant does not claim that his supposed set-off is a counterclaim, and it is not. It has no connection with the 'foundation' or 'subject' of the plaintiffs' action. Civil Code, sec. 95. (3) Neither is his supposed set-off a set-off. A set-off 'must be a cause of action arising upon contract, or ascertained by the decision of a court.' Civil Code, sec. 98. There is no pretense in this case that the defendant's set-off is founded upon any contract, or upon the decision of any court. It is founded purely and entirely upon a tort."

The following authorities bear on the question, but are not cited as strictly in point: *Van Arsdale et al. v. Edwards*, 24 Okla. 41, 101 Pac. 1123; *Johnson v. Acme, etc.*, 24 Okla. 468, 103 Pac. 638; *St. L. & S. F. R. Co. v. Bradford*, 18 Okla. 154, 88 Pac. 1050; *Richardson v. Penny*, 10 Okla. 32, 61 Pac. 584;

Willoughby v. Ball, 18 Okla. 535, 90 Pac. 1017. Nor have we overlooked the holding of a number of courts, that a party having a cause of action founded in tort may waive the tort, and declare on an implied contract growing out of same, and thus make use of it as a set-off. Bliss, Code Pleading (2d Ed.) 381, and authorities cited.

This pleading, then, being an improper one, as presenting a question that could not be properly raised in this suit, defendant has suffered no injury, regardless of how badly he was surprised, and regardless of whether, having brought out the evidence, he could ordinarily have taken advantage of the result he obtained, which is not decided. This also eliminates the question raised regarding requested instructions on this phase of the case.

2. The second point urged is the admission of incompetent evidence, and refers first to the testimony of plaintiff denying the execution of the note, which was caused to be repeated by plaintiff after being first brought out by defendant. This point fails under the first subdivision of this opinion. The other evidence complained of referred to the measure of plaintiff's damages, and goes to that offered as to the proof of the value of the mules and also to certain damages claimed for the loss of their use.

There was some evidence offered as to the value of the mules that was entirely competent by both parties. The evidence as to damage suffered by plaintiff by being deprived of the use of the animals, whereby he failed to make so valuable a crop as he otherwise would have made, was incompetent, but rendered entirely harmless by the court, in refusing to allow plaintiff any such damages. The jury were instructed correctly (section 2910, Comp. Laws 1909) that, this being a suit for conversion, all that could be recovered was the value of the animals, and interest. It may be added that the recovery was based on this positive instruction of the court. Therefore the admission of other elements was expressly taken from the jury, and did not enter into the verdict.

3. The third point urged in the brief—that the court should have sustained defendants' demurrer to the evidence—is entirely without merit. Plaintiff's proof of ownership and possession of

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the mules, and the wrongful taking and conversion of same by the defendants, was ample, clear, and convincing. Very little evidence was produced by defendants controverting same. On this point, plaintiff's evidence greatly preponderated. In fact, on the question of the ownership of the mules, very little of defendants' evidence was competent. The most of it consisted of statements, oral and written, that Morrison, the defendant in the attachment suit, had, in the absence and without the knowledge of plaintiff, claimed to be the owner. This was only competent on the question of good faith and want of malice in taking the mules, and, as a malicious taking had been set up, this evidence was competent, but not as against plaintiff's title.

4. Under the fourth point made by defendants, it is claimed that the court erred in refusing to give three instructions offered by them. The first was "not to allow damages to plaintiff for loss of or failure of crops." The court, as has been seen, refused to allow such recovery, and none such was had. The next was a refusal to give defendants' instruction on the measure of damages. The one given by the court is almost identical with the one refused, and was stronger in defendants' favor than the one it had offered. The next one refused referred to the \$1,100 note, upon which relief was asked, and has been disposed of elsewhere.

5. The next and last point urged is that the court erred in instructing the jury that three-fourths of the jurors could return a verdict, as the suit was filed before statehood; inasmuch, however, as a unanimous verdict was returned, this was error without injury, and will not reverse the case. We have examined the entire record, and feel like the verdict was right—in fact we do not see how any jury could have found otherwise—and that there has been no substantial error in the case.

The judgment should be affirmed.

By the Court: It is so ordered.

Baltz v. Mitchell.

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No. 2879. Opinion Filed December 20, 1913.

(137 Pac. 666.)

PUBLIC LANDS—Decisions of Interior Department—Review by Courts.

The courts will not disturb decisions by the Department of the Interior based purely upon findings of fact from the testimony submitted, where there is no fraud nor apparent error of law in such department decisions.

(Syllabus by Harrison, C.)

*Error from District Court, Rogers County;
T. L. Brown, Judge.*

Action by Franklin P. Mitchell against Foster Baltz. Judgment for plaintiff, and defendant brings error. Reversed.

A. F. Mood, for plaintiff in error.

W. H. Kornegay, for defendant in error.

Opinion by HARRISON, C. This was an action by Franklin P. Mitchell against Foster Baltz, *nee* Stone, for possession of an allotment which had been awarded to Foster Baltz by the Commission to the Five Civilized Tribes, from whose decision Franklin P. Mitchell appealed to the Commissioner of the General Land Office, where the decision of the Commission to the Five Civilized Tribes was affirmed, and then appealed to the Secretary of the Interior, where it was again affirmed and the allotment awarded to plaintiff in error, Foster Baltz. Mitchell then brought this action in the district court of Rogers county to have the title to said allotment declared in him. The cause was tried and judgment rendered decreeing title in Mitchell; and from such judgment Foster Baltz appeals to this court.

This is one of three companion cases, all resting upon the same state of facts and involving the same question of law; the other two cases being *Bell v. Mitchell*, 39 Okla. 544, 135 Pac. 1136, and *Baltz v. Mitchell*, 39 Okla. 547, 135 Pac. 1137, both of

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which were decided at a former term and which are determinative of the same question, viz., whether the Department of the Judiciary will disturb decisions of the Department of the Interior based purely upon findings of fact from the testimony submitted, where there is no fraud nor apparent error of law in such department decision.

In *Bell v. Mitchell*, *supra*, the same state of facts and question of law involved herein are fully discussed and the following holding announced:

"The trial court committed error. It is the law that where the department has erred in a matter of law, or the losing party before the department had fraud practiced upon him, or the department has committed such gross error that its finding of fact practically amounts to fraud, its action is not final and conclusive upon the court, and that the party who had been wronged by its action may obtain relief. *Rector v. Gibbon*, 111 U. S. 276 [4 Sup. Ct. 605, 28 L. Ed. 427]; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Garrett v. Walcott*, 25 Okla. 574, 106 Pac. 848. But the action of the department in its decision in contest cases should not be set aside or disturbed for slight reasons or merely because of a preponderance of the evidence. See *Quinby v. Colan*, 104 U. S. 420, 26 L. Ed. 800. The Commission to the Five Civilized Tribes was vested with authority to hear contests and to determine conflicting rights of applicants to allot land in the Indian Territory, and it is only in exceptional cases and under unusual and extraordinary circumstances that the action of the department should be disturbed."

And after further discussing the facts in the case, which were the same as the facts in the case at bar, the court concludes as follows:

"Not only did the letter of the law give it to him under the rule announced, but equity also entitled him to select the land as his allotment. Mitchell had invested nothing in the land. It seems clear from the record that Mitchell was not the beneficial owner of the land, but was holding it simply as a cloak for Schmoy, who was the actual owner. There is nothing in law or equity to entitle plaintiff in this case to a judgment, and it should be reversed and remanded, with instructions to the trial court to dismiss the action."

This opinion was followed in *Baltz v. Mitchell*, *supra*, for the reasons stated in the opinion.

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There is no substantial difference between the facts in the case at bar and those in the above companion cases; the decisive question of fact in each case being, Who owned the improvements on the allotment in question at the time same was awarded to the allottee? the department finding from the testimony that one James A. Bell owned said improvements. We find nothing in the record that takes the case at bar out of the rule announced in *Bell v. Mitchell*, *supra*, and the rule there announced is followed here.

Hence the judgment of the trial court should be reversed, and the action of plaintiff below ordered dismissed.

By the Court: It is so ordered.

BILBY v. BROWN *et al.*

No. 2881. Opinion Filed July 22, 1913.

Rehearing Denied December 20, 1913.

(137 Pac. 102.)

FORCIBLE ENTRY AND DETAINER—Right of Action—Procurement of Possession. Plaintiff was in possession of the land in controversy by his tenants. At the expiration of the term of his tenants, but before they had left the premises, the defendants, claiming to have rented the land from another claiming the land by title superior to plaintiff, moved upon the land without objection from plaintiff's tenants, and took entire possession as soon as plaintiff's tenants moved away, and refused to surrender possession on demand. **Held**, that plaintiff could maintain an action of forcible entry and detainer for the land.

(Syllabus by Rosser, C.)

Error from County Court, Hughes County;
P. W. Gardner, Judge.

Action by Nicholas V. Bilby against William Brown and another. Judgment for defendants, and plaintiff brings error. Reversed and rendered.

Lawson & Samples, for plaintiff in error.

Warren & Miller, for defendants in error.

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Opinion by ROSSER, C. The plaintiff, Nicholas V. Bilby, was in possession of the land described in the petition in this case, occupying it by his tenants, Robert and Rube Pollock. One Gilliland claimed the land under a deed from the heirs of Little Peter, a Creek Indian. In the month of November, 1910, about the time the Pollocks had moved from the land, Gilliland had the defendants, Brown and Bean, move upon the land and take possession as his tenants. The evidence shows that the two defendants moved their effects to the place before the Pollocks moved away, but the Pollocks made no objections to their entering and moved out immediately. The plaintiff brought this action in forcible entry and detainer to recover the possession of the land. There was a verdict and judgment for the defendants, and the plaintiff appeals.

The first and second grounds assigned as reasons for a new trial are the misconduct of counsel for the defendants in error in stating to the jury in their opening statement that the land belonged to John W. Gilliland, and that he had been adjudged to be the owner of said land at the March, 1911, term of the district court, and that the plaintiff had no right in the land, and in making the same statement in their argument after the evidence was in. The record shows that these statements were made either in the opening statement of counsel or in the argument to the jury. It is true that the motion for new trial alleges the fact that they were made as ground for a new trial, but if they were made they were not preserved in any manner so as to bring them to this court. Therefore, so far as this court is concerned, they were not made, and the question cannot be considered.

The next ground for reversal urged is that the verdict is not supported by the evidence. As stated above, the evidence shows that the plaintiff was in possession by his tenants. The defendants entered surreptitiously and without his consent. There is a very strong indication in the testimony that they entered by collusion with his tenants; still there is no direct evidence to that effect. Our statutes of forcible entry and unlawful detainer are very similar to the statutes of Nebraska upon the same subject. See *Brennan v. Shanks*, 24 Okla. 563, 103 Pac. 705. In

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the case of *Brown v. Feagins*, 37 Neb. 256, 55 N. W. 1048, it was held that "a person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto." And it was held in that case that, where a person drove in through a gap in an inclosure around the premises and took possession, the person previously in possession could maintain action in forcible entry and detainer, though he was not actually on the premises when the defendant entered. A case very similar to the one now before the court is *Estabrook v. Hateroth*, 22 Neb. 281, 34 N. W. 634. In that case the defendant obtained possession immediately after plaintiff's tenant had vacated the premises. It was held that the plaintiff could recover. The case of *Childress v. Black*, 9 Yerg. (Tenn.) 317, is also somewhat similar to the case at bar. In *Oklahoma City v. Hill*, 4 Okla. 521, 46 Pac. 568, the sheriff went upon the premises occupied by the plaintiffs and arrested plaintiffs and took their furniture out of the building. The city was claiming the property, and, as soon as the sheriff had removed the plaintiffs from the premises, the policemen and city officers moved in. It was held that plaintiffs could recover possession in an action of forcible entry and detainer. Some of the language of the court indicates that it was considered that the city ratified the force which the sheriff used, but it is manifest that the city was in no way a party to the conduct of the sheriff. The true ground of the decision was that the city had taken possession under circumstances that amounted to fraud, just as if its officers had slipped in and taken possession while the partners were gone to the post office, and that it could not retain possession thus fraudulently and surreptitiously obtained. See, also, *Chisholm v. Weise*, 5 Okla. 217, 47 Pac. 1086; *Campbell v. Coonradt*, 22 Kan. 704; *Emsley v. Bennett*, 37 Iowa, 15.

In the present case it was the duty of the tenants to turn back the property to their landlord, the plaintiff in this action. The defendants, either by conniving with them or otherwise, prevented them from discharging this duty. They cannot retain

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a possession obtained in this manner. Such scrambles for the possession of real property are not to be encouraged by the law, as they tend to encourage breaches of the peace and cause people to resort to their own methods of obtaining their remedy instead of resorting to the law.

The judgment is reversed and here rendered in favor of the plaintiff.

By the Court: It is so ordered.

VAUGHAN *et ux.* v. HOLDER.

No. 2900. Opinion Filed December 20, 1913.

(137 Pac. 672.)

1. **ADVERSE POSSESSION—What Constitutes.** A possession, to be adverse, must be open, visible, continuous, and exclusive, with a claim of ownership such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants. Following *Flesher v. Callahan*, 32 Okla. 283, 122 Pac. 489.
2. **CHAMPERTY AND MAINTENANCE—Grants of Land Held Adversely—Validity.** A conveyance of land made in contravention of sections 2214 and 2215, Comp. Laws 1909 (Rev. Laws 1910, secs. 2259 and 2260), is void as against persons holding adversely, either by themselves or tenants, and claiming to be owners of the land under color of title. Following *Larney v. Aldridge*, 31 Okla. 447, 122 Pac. 151.
3. **SAME.** A deed from a person out of possession of real property, and who has not been in possession within a year, and who has not within that time taken the rents and profits, is void as against persons in adverse possession. Following *Johnson v. Myers*, 32 Okla. 421, 122 Pac. 713.

(Syllabus by Harrison, C.)

Error from District Court, Grady County;
Frank M. Bailey, Judge.

Action by E. A. Vaughan and Irene Vaughan, his wife, against George W. Holder, to quiet title. Judgment for defendant, and plaintiffs bring error. Affirmed.

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Wm. Stacey, for plaintiffs in error.

F. E. Riddle, for defendant in error.

Opinion by HARRISON, C. In March, 1910, plaintiffs, E. A. and Irene Vaughan, began an action in the district court of Grady county to quiet title to a certain 25-acre tract of land situated in said county, the same being part of the 100-acre surplus allotment of Mary Crowder. Each party traced title to the same source, Mary Crowder. Plaintiffs set up the following chain of title, to wit: Deed from Mary Crowder to J. B. Champion, dated September 4, 1908, recorded October 5, 1908, conveying the entire 100-acre surplus allotment, and on the same day J. B. Champion conveyed the same land to Sam Noble; both deeds being recorded on the same day. On July 6, 1909, Sam Noble and wife conveyed for a consideration of \$1 and other valuable considerations the 25 acres in controversy to the plaintiffs, E. A. and Irene Vaughan. Previous to the latter date, namely, October 3, 1908, however, W. C. Kendall and wife executed a quitclaim deed to Sam Noble, relinquishing and quitclaiming all their title to the entire 100-acre tract, which quitclaim deed was recorded October 5, 1908. This constituted plaintiffs' chain of title. As against this, the defendant, Holder, offered the following chain of title, to wit: Deed from Mary Crowder to W. C. Kendall, dated October 25, 1907, recorded November 8, 1907, conveying an undivided one-fourth interest in and to the entire 100-acre allotment. Also deed from Mary Crowder to W. C. Kendall, dated December 27, 1907, recorded October 23, 1908, conveying the 25 acres in controversy, and deed dated January 4, 1908, recorded January 30, 1908, from W. C. Kendall and wife to G. W. Holder, the defendant, conveying the same 25 acres. The record discloses that the defendant, Holder, took possession of the land in controversy in February, 1908, erecting thereon substantial and valuable improvements, consisting of two barns and hog sheds, building a residence and digging a well, and held and cultivated same during the years 1908 and 1909, holding open and notorious possession and undisturbed control over the land during such period. In the latter part of 1909, however,

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after the crop had been gathered, the tenant of G. W. Holder left the country. There is some intimation in the record that his leaving was procured by the plaintiff Vaughan in order that plaintiff might get possession. However that may be, it is apparent that as soon as Holder's tenant left, Vaughan took possession through his tenant. The cause was tried by the court, and judgment rendered, decreeing the title to the land in question in G. W. Holder; the court holding that the chain of title through which Holder claimed was superior and paramount to that of plaintiff Vaughan, and that the deeds through which Vaughan claimed title, in so far as they affected the title of the defendant, G. W. Holder, were to be canceled and held for naught. From such judgment the plaintiff appeals upon seven assignments of error.

The fourth, fifth, sixth, and seventh assignments relate to the court's ruling on the admission and rejection of testimony. We have examined the record, and find no material error in this regard. The first, second, and third assignments, however, go to the action of the court in denying motion for a new trial, and to the questions whether the verdict was contrary to law and not sustained by sufficient evidence. The testimony consisted almost wholly of record evidence, with the exception of the testimony in reference to the adverse possession of the land by defendant Holder through his tenant during the period from February, 1908, to the latter part of the year 1909, and, there being no conflict in this testimony, it merely presents a question of law as to whether the facts disclosed constituted such adverse possession as is contemplated by section 2026, St. Okla. 1893, which statutes were in force at the time of the controversy.

The elements which constitute adverse possession have been fully defined by this court in *Smith v. Phillips*, 9 Okla. 297, 60 Pac. 117; *Wade v. Crouch*, 14 Okla. 593, 78 Pac. 91; *Flesher v. Callahan*, 32 Okla. 283, 122 Pac. 489; *Martin v. Cox*, 31 Okla. 543, 122 Pac. 511; *Long-Bell Lumber Co. v. Martin*, 11 Okla. 192, 66 Pac. 328.

In *Flesher v. Callahan*, *supra*, adverse possession is defined as follows:

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DODD v. COOK.

No. 2915. Opinion Filed December 20, 1913.

(137 Pac. 348.)

INDIANS — Conveyances of Allotment — Married Female Minor. The marriage of a female member of the Choctaw Tribe of Indians, under the age of eighteen years, does not affect the restrictions imposed by the act of Congress against the sale of her allotments during minority, and a conveyance by such minor of her allotments without the supervision of the probate court is void, notwithstanding her marriage prior to the execution of such conveyance.

(Syllabus by Harrison, C.)

*Error from District Court, Choctaw County;
Tom D. McKeown, Judge.*

Action by G. W. Dodd against R. L. Cook. Judgment for defendant, and plaintiff brings error. Affirmed.

H. A. Ledbetter and Cocke & Willis, for plaintiff in error.

Howe & Stanley, for defendant in error.

Opinion by HARRISON, C. This was an action in ejectment by G. W. Dodd against R. L. Cook for possession of a certain tract of land situated in Choctaw county. The plaintiff alleged that he had the legal estate in fee simple and equitable estate in and to the land in question and was entitled to immediate possession of same; that defendant had unlawfully kept him out of possession to his detriment in the sum of \$200. Defendant answered by general denial, and the cause was tried by a jury, resulting in a judgment for defendant, and plaintiff appeals.

The decisive facts involved are: That one John Gore, a half-blood Choctaw Indian, died prior to November, 1904; that he left surviving him only one heir at law, Minnie Gore, a quarter-blood, who inherited her father's allotment. In November, 1904, Minnie Gore executed a deed to the land in question to G. W.

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Dodd. At the time of the execution of the deed, however, she was a minor, but was married to one Gaskell and executed the deed in the name of Minnie Gaskell, *nee* Gore. The question, then, is whether this deed, conveying the land in question to G. W. Dodd, while she was a minor, although she was a married woman, was a valid conveyance. If not, then the plaintiff, G. W. Dodd, had no title or estate in the land in question and no right of possession.

The question of the validity of a deed executed by a minor of any one of the Five Civilized Tribes was before this court in the case of *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755, where, in an opinion by Justice Hayes, after a careful review of the treaty and statutory provisions relating to such question, the court held:

"A minor within the meaning of said section includes males under the age of 21 years and females under the age of eighteen years, and the marriage of such a minor does not confer upon him or her the authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts of the state."

Also in the case of *Gill v. Haggerty*, 32 Okla. 407, 122 Pac. 641, the same question was before this court, and in an opinion by Brewer, C., the court held:

"The marriage of a Creek freedman under the age of 21 years does not affect the restrictions imposed by the acts of Congress and treaty provisions against the sale of his allotment during minority; and a conveyance by such minor of his allotment is void, notwithstanding his marriage prior to the execution of such a conveyance."

In both the foregoing cases the various treaty provisions and acts of Congress pertaining to the rights of minors to convey their allotment without the supervision of the probate courts, notwithstanding such minor may have been married at the time of the conveyance, are exhaustively discussed and a conclusion reached that a conveyance of this character, by a minor, although such minor may have been married at the time, conveys no title to the land in question and gives no right or interest to the grantee of such land.

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It follows, therefore, that the deed executed by Minnie Gaskell, *nee* Gore, to G. W. Dodd, while she was yet a minor, although married, conveyed no title to the land and gave the grantee no interest in or to same.

The remaining questions presented by plaintiff in error, being based upon the contention that the deed to Dodd was valid, become unnecessary to determine. For, if Dodd had no title or interest in the land, he had no right of action.

The judgment, therefore, should be affirmed.

By the Court: It is so ordered.

ROGERS *et al.* v. QUABNER *et al.*

No. 3144. Opinion Filed December 20, 1913.

(137 Pac. 361.)

1. **NEW TRIAL—Motion—Amendment.** A motion for a new trial may be amended, after the three days allowed by the statute for filing the motion, by a clearer, more appropriate statement or elaboration of the grounds originally set up; but such an amendment, filed after the statutory time has expired, cannot set up new and independent grounds therefor.
2. **APPEAL AND ERROR—Discretionary Ruling—Granting New Trial.** The discretion of the trial court in granting a new trial is so broad that its action in so doing will not be disturbed on appeal unless the record shows clearly that the court has erred in the decision of some clear and unmingled question of law, and that the order granting the new trial is based upon such erroneous view of the law.

(Syllabus by Brewer, C.)

Error from District Court, McIntosh County;
Preslie B. Cole, Judge.

Action by Maria Rogers against James Quabner and others. From an order granting a new trial, plaintiff and defendant Edwin A. Welty bring error. Affirmed.

Robert J. Bone, for plaintiffs in error.

John F. Vaughan and *J. G. Schofield*, for defendants in error.

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Opinion by BREWER, C. This is an action brought by Maria Rogers, plaintiff below, for possession of certain lands, damages for their detention, that a deed be declared to be a mortgage, for the cancellation of a mortgage, and to quiet title. Edwin A. Welty was made a defendant in the court below as the holder and owner of an admitted mortgage. James Quabner, the principal defendant below, answered that he was the owner and original allottee of the lands; that he had never sold same to plaintiff; that deeds under which she claims to hold were forgeries, etc. Harlin, Wiley, and Hill were merely tenants of Quabner. Buell answered, asserting title, and denied that his deed from plaintiff was intended as a mortgage. Welty, as defendant below, set out his mortgage, averred a breach of its conditions, and prayed for judgment and foreclosure against plaintiff.

The case was tried by agreement of the parties to the court and without the intervention of a jury. Much evidence was introduced, and, after what seems to have been a somewhat prolonged and stormy trial, the court found in favor of the plaintiff Maria Rogers as to the ownership and right to the possession of the land; that the deeds from Quabner to her, under which she claimed, were not forgeries but were valid and subsisting; that the deed to Buell was in fact a mortgage; that Welty's mortgage was a valid and subsisting lien and should be foreclosed and the property sold to satisfy the same, etc. This finding and judgment was rendered on the 4th day of January, 1911. All of the defendants in the court below except Welty, who was satisfied with the decree, filed on January 5, 1911, their joint motion for a new trial, stating the following grounds therefor:

"(1) Irregularities in the proceedings of the court by which the parties were prevented from having a fair trial. (2) Misconduct of the prevailing party. (3) Accident and surprise which prudence could not guard against. (4) That the decision is not sustained by sufficient evidence and is contrary to law. (5) Error of law occurring at the trial and excepted to by the party making the application."

This motion for a new trial came up for hearing on April 6, 1911, and the consideration thereof was passed, on the court's own motion, until April 10, 1911.

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On April 10, 1911, the defendants filed an amended motion for a new trial, setting up, in addition to some of the grounds in the former motion, that of newly discovered evidence, alleged to be material in the case, and which it is alleged could not have been produced with reasonable diligence at the trial. Also the ground that the court had erred in the admission of certain evidence specifically set out. This amended motion was supported by the affidavit of James Quabner, the principal defendant, and also affidavits of John King and Wesley Thompson, setting out the newly discovered evidence. The filing of this amended motion was objected to by the present plaintiffs in error, who also filed a motion to strike it from the files. The objection and the motion to strike were both overruled by the court, and the plaintiffs in error requested that the hearing thereof be continued to the end that they have an opportunity to examine the motion and affidavits and investigate the matters therein contained. The hearing on the motion was continued until the next day, but a further continuance thereof was denied by the court, and on the 11th day of April, 1911, the court sustained the motion for a new trial, and set aside and vacated the judgment as to all its parts, and granted a new trial of the cause. From this order granting a new trial the plaintiffs in error have appealed to this court on properly certified case-made.

The plaintiffs in error in their brief correctly apprehend, and as a matter of fact concede, that the only question involved in this appeal is as to whether or not the trial court abused the discretion, admittedly a large one, reposed in it by law.

It is true some point is made that the amended motion for a new trial should not have been permitted. As to all of the new matter brought into the amended motion, except that of newly discovered evidence, the point is well taken. Of course as to this exception it is not; as a motion for a new trial, upon the ground of newly discovered evidence, may be filed at any time within one year. Section 5033, Rev. Laws 1910. On the question of amendments to a motion for a new trial, in the case of *Rice et al. v. Folsom*, 32 Okla. 496, 122 Pac. 236, this court has announced the following rule:

"A motion for a new trial may be amended after the three days allowed by statute for filing the same by a clearer, more appropriate statement or elaboration of the grounds contained therein; but such an amendment, filed after the statutory time has passed, cannot set up new and independent grounds therefor."

However, after eliminating from consideration the improper matter alleged in the amended motion, there still remains a number of grounds for a new trial in addition to that of newly discovered evidence, properly before the court for consideration; and as the court has given no indication as to why he sustained the motion or of the reasons impelling him so to do, and as we have no means of determining the same, how can we say, in justice to the court who heard this involved and complicated case, some of the parties to which were ignorant and illiterate negroes, that he has abused the very wide and extensive discretion vested in the court, under the rules announced in more than a score of cases decided by this court? How can we say that no fatal errors of law had crept into this case, in its lengthy and tortuous passage, which the court may have become convinced of, and yet which we cannot easily perceive? This was not a jury trial; the court heard all the evidence, necessarily with attention, saw the parties, heard them testify, in fact was surrounded by what is sometimes termed "the atmosphere of the case"; and thereafter, when maturely considering the entire record and proceedings, something convinced the court that the ends of justice would be best subserved by giving the defendants another chance. We cannot therefore say, on this record, that the court has committed error regarding some clear and unmingled question of law; nor can we say that an abuse of discretion has been shown justifying a reversal of this case. The following, and many other decisions, might be referred to as sustaining the views herein expressed. *St. L. & S. F. R. Co. v. Wooten*, 37 Okla. 444, 132 Pac. 479; *St. Bank of Lawton v. Chattanooga St. Bank*, 23 Okla. 767, 101 Pac. 1118; *Davis v. Stilwell*, 32 Okla. 757, 124 Pac. 74; *Jamieson v. Classen Co.*, 33 Okla. 77, 124 Pac. 67; *Ardmore Lodge v. Dawson*, 33 Okla. 37, 124 Pac. 66; *Stapleton v. O'Hara*, 33 Okla. 79, 124 Pac. 55; *Chapman v.*

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Mason, 30 Okla. 500, 120 Pac. 250; *National R. & B. Sup. Co. v. Elsing*, 29 Okla. 334, 116 Pac. 790; *Jacobs v. City of Perry*, 29 Okla. 743, 119 Pac. 243; *Exchange Bank v. Bailey*, 29 Okla. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1032; *Hobbs v. Smith*, 27 Okla. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Duncan v. M. C. Coal Co.*, 27 Okla. 427, 112 Pac. 982.

The cause should be affirmed.

By the Court: It is so ordered.

SCHAFFER v. MIDLAND HOTEL CO. et al.

No. 3148. Opinion Filed December 20, 1913.

(137 Pac. 664.)

1. **TRIAL—General Finding—Construction.** Where an action is tried to the court and a general finding is made in favor of the defendant, such general finding necessarily includes a special finding in favor of the defendant of every particular fact necessary to sustain the general finding.
2. **REFORMATION OF INSTRUMENTS—Grounds—"Mutual Mistake"—Proof.** The law does not authorize the reformation of a written contract on the ground of mutual mistake (i. e. a mistake by each of the parties thereto) unless the proof of such mutual mistake is clear and convincing.
3. **APPEAL AND ERROR—General Finding—Evidence.** Where the defendant seeks in a cross-petition to reform a written contract sued upon, on the ground of mutual mistake of the parties thereto, and the cause is tried to the court, and there is a general finding in favor of the defendant, and an exception is urged on the ground that the same is not supported by the evidence, held, this court will examine the testimony so far as necessary to ascertain whether or not the finding of the court is reasonably supported by the evidence, and if it be found that the general finding, or any particular finding necessarily included in the general finding, is not reasonably supported by the evidence, the general finding will be set aside and a new trial ordered.

(Syllabus by Galbraith, C.)

Error from District Court, Comanche County;
J. T. Johnson, Judge.

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Action by Henry Schafer against the Midland Hotel Company, a corporation, and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

R. B. Forrest, Forrest & Sansom, and *Geo. D. Key*, for plaintiff in error.

B. M. Parmenter and *Stevens & Myers*, for defendants in error.

Opinion by GALBRAITH, C. Henry Schafer commenced an action in the district court of Comanche county against the Midland Hotel Company, a corporation, which had been promoted by himself and Geo. H. Block, on a promissory note of the company for \$5,000, which had been indorsed by Schafer and Block and paid by Schafer, and on an account amounting to \$2,200 for money advanced by Schafer in the prosecution of the work completing the hotel. It was alleged that Block was liable for these claims against the Midland Hotel Company by virtue of a written contract entered into between Schafer and Block on the 13th day of April, 1910, which evidenced a sale by Schafer to Block of his stock in the Midland Hotel Company, and wherein Block undertook and agreed to pay all the liabilities outstanding against the company.

The defendants answered, admitting the execution of the note by the company and the advancement of the \$2,200 by Schafer and the signing of the contract of April 13, 1910, but alleged by way of cross-petition that the note and account and the plaintiff's interest therein had been sold to the defendant Block, and that the plaintiff had no further interest in the note and could not maintain the action, and that by mutual mistake of the parties this part of the agreement by which Schafer sold his interest in the note and account to Block was omitted from the written contract of April 13, 1910, and prayed that the plaintiff take nothing by the said action, and that the contract of April 13, 1910, be reformed according to the real and true agreement of the parties, and that Schafer be required to execute an assignment of the insurance policy according to the agreement of the parties, and for costs and general relief.

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When the cause came on for trial, each of the parties waived a jury and agreed that the cause might be tried to the court. The cause was tried on the 5th of January, 1911, and the argument of counsel was deferred until about a month later, and then the cause was taken under advisement by the court and judgment rendered thereon on the 7th of July following. The record shows that on this last date the court "here and now announces to the parties his finding of fact and the law in the case in favor of the defendants," and that judgment was thereupon rendered in favor of the defendants, and that the plaintiff take nothing by his action, and that the costs be taxed against him, and further adjudged that the defendant Geo. H. Block be subrogated to all the rights of Henry Schafer in a certain insurance policy for \$12,500, described in the answer and cross-petition. From this judgment Schafer perfected an appeal to this court.

One of the assignments of error urged by the plaintiff in error is that the finding of the court is not supported by the evidence. The record does not show that either party requested the court to make special findings of fact. He was therefore justified in making a general finding.

It has been many times announced by this court that, where a jury is waived and the cause is submitted to the court for trial, the finding of the court will not be disturbed, where it is reasonably supported by the evidence; that the findings of the trial court come to this court with the same force as the verdict of the jury on disputed questions of fact. However, the rule is equally well settled that, if the findings are wholly unsupported by the evidence, the findings of the court will be set aside, and that this court will examine the testimony so far as to ascertain whether or not there is evidence in the record to support the findings of the court. *Reeves & Co. v. Brennan*, 25 Okla. 544, 106 Pac. 959; *First Nat. Bank v. Arnold*, 28 Okla. 49, 113 Pac. 719; *De Witt v. City of El Reno*, 28 Okla. 315, 320, 114 Pac. 253; *Bretch Bros. v. Winston & Sons*, 28 Okla. 625, 115 Pac. 795; *Hampton v. Thomas*, 35 Okla. 529, 130 Pac. 961; *Hall v. Bruner*, 36 Okla. 474, 127 Pac. 255.

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It has been repeatedly announced by decisions of this court that, where a cause is tried by the court and the finding of the court is general, it is a finding of every special thing necessary to be found in order to sustain the general finding. *Farmers' & Merchants' Nat. Bank v. School District No. 56, Kiowa County*, 35 Okla. 506, 130 Pac. 549; *City of Chickasha v. Looney*, 36 Okla. 155, 128 Pac. 136; *Wat-tah-noh-zhe v. Moore*, 36 Okla. 631, 129 Pac. 877. It follows, therefore, from the application of this rule to the case at bar, that the general finding made by the court in favor of the defendants was a special finding of fact that there had been a mutual mistake made by Schafer and Block, and that on account of such mutual mistake the agreement between Block and Schafer, whereby Block purchased the interest of Schafer in the note and account in suit, and that Schafer agreed to transfer the same to Block, was omitted from the written contract of April 13, 1910.

We have carefully examined the testimony to ascertain whether or not there is any testimony in the record that would sustain this finding that there was a mutual mistake between these parties on this disputed question. After such examination we are constrained to say that such finding is wholly unsupported by the evidence. The testimony of Block himself would scarcely support this finding of the court. The evidence shows that, at the time the trade was made between Schafer and Block, Schafer was in the city of Lawton, and after some three days' negotiations an agreement was reached, and that he and Block then proceeded to the office of Block's attorney, and each made a statement to the attorney of the terms and conditions of the deal; that the attorney took notes of these statements and then, in the presence of the parties, dictated the contract to his stenographer; and that the agreement was then typewritten and read over to the parties, and some changes made therein, and then signed by each of the parties. This contract is plain and unambiguous in its terms. In three separate places therein distinct reference is made to what Schafer sold and Block purchased, and each time particular recital is made that it was the 250 shares of stock in the Midland Hotel Company of the par value of \$100 each.

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Schafer testified positively that the contract expressed the real agreement entered into between himself and Block, and he is strongly corroborated by the contract itself, and also by the fact that, although Block knew that Schafer had taken up the \$5,000 note and had it in his possession at the time the trade was made and the contract of April 13, 1910, entered into, he never at that time or at any subsequent date prior to filing the suit asked that the note be turned over to him. The only ground on which this contract is sought to be reformed is on account of mutual mistake—"that, by mutual mistake of the parties and the scrivener who wrote the contract, said provisions were omitted from the same."

Under the law the court could not reform the contract on this ground, unless the evidence that there had been a mutual mistake was positive, clear, and overwhelming. Even if the written contract did not embody the terms of the agreement as Block understood them, and there was a mistake on his part, it is clear that there was no mistake on Schafer's part. The written contract expressed the agreement as he understood it, and it is clear that there was no mutual mistake. In the case of *Hope v. Bourland*, 21 Okla. 864, 98 Pac. 580, Mr. Justice Turner, in rendering the opinion of the court, said:

"It is well settled that to warrant a reformation, in the absence of fraud or imposition, there must be a mutual mistake (that is, a mistake shared by both parties); that to justify the reformation of a deed delivered, accepted, and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing; and, until a mistake has been established by such proof as leaves no rational doubt of the fact, no change will be made in the writing sought to be reformed."

This statement of the law is supported by abundant authority referred to in the above opinion.

It is also contended that the judgment is not responsive to the issues. While this is true, yet, since the cause should go back for a new trial, this condition can be remedied in the decree that may be entered in said cause upon such trial.

We find that the judgment appealed from should be vacated and said cause remanded for a new trial.

By the Court: It is so ordered.

Kibby v. Cubie, Heimann & Co.

KIBBY v. CUBIE, HEIMANN & CO.

No. 3178. Opinion Filed December 20, 1913.

(137 Pac. 352.)

1. **COMMERCE — Foreign Corporations — Right to Sue.** A foreign corporation, engaged in interstate commerce, is not barred by sections 1338 and 1341, Rev. Laws 1910, from maintaining an action on a contract of employment entered into with a citizen of the state of Oklahoma, although it has not filed a copy of its articles of incorporation, etc., with the Secretary of State of the state of Oklahoma, and has not appointed a service agent in the state.
2. **SAME.** Where a defendant in such action, after having answered to the merits, by permission of the court files a supplemental answer setting up these statutes in bar of the action, held that a demurrer to such supplemental answer was properly sustained.

(Syllabus by Galbraith, C.)

*Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.*

Action by Cubie, Heimann & Co., a foreign corporation, against C. F. Kibby, for debt. Judgment for plaintiff, and defendant brings error. Affirmed.

J. V. Cabell and Everest, Smith & Campbell, for plaintiff in error.

Embry & Hastings, for defendant in error.

Opinion by GALBRAITH, C. Cubie, Heimann & Co., a New York corporation, engaged in the business of selling embroideries by samples, on orders taken by traveling salesmen, which orders were sent to the plaintiff's place of business in New York City, and if approved by them the goods were shipped from there to the purchasers in the various states. The action was based upon a written contract of employment entered into by Cubie, Heimann & Co. and C. F. Kibby, in the city of St. Louis, Mo., on the 17th day of April, 1909, whereby Kibby was employed as a traveling salesman for the company, for the sale of its merchandise in a designated territory, embracing the states of Missouri, Kansas, and Oklahoma, for a term of one year,

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beginning on the 1st day of July, 1909, and ending on the 30th day of June, 1910. The contract provided that Kibby's compensation should be a specified percentage of the net amount of goods sold, and also that during the term of the contract he should have a drawing account of \$250 per month, and in addition to this that he should be paid not to exceed \$75 per week for traveling expenses when out on the road, and other minor expenses were provided for in the contract. The contract also stipulated that if the amount paid Kibby on his drawing account and traveling expenses should exceed the total sum of the commissions due him on the sale of goods, Kibby should repay such excess to the company at the termination or discontinuance of the contract. It was alleged in the petition that the sum of \$4,233.30 had been advanced to Kibby during the term of his employment, and that the total amount of the commissions due him on sales as provided in the contract amounted to \$1,140.62, leaving a balance due from Kibby of the sum of \$3,092.68, and judgment was prayed for the last sum named. Kibby answered the petition by a general denial, and in the second count, in the nature of a cross-petition, alleged certain damages by reason of the fraud and deceit practiced upon him, being the inducing cause for his entering into the contract, and alleged damages in the sum of \$3,800, and prayed for judgment for the difference between the damages alleged in his cross-petition and the amount claimed in plaintiff's petition. A reply was filed to the cross-petition by way of a general denial, and the trial commenced on the 12th day of April, 1911. On the following day, and before the trial had closed, Kibby asked and obtained permission of the court to file a supplemental answer which was in words and figures following:

"Comes now the defendant herein, C. F. Kibby, and for answer to the petition of plaintiff herein files this amendment to his original answer and counterclaim herein, leave of the court having been first had and obtained, and states that the plaintiff herein should not be allowed to maintain this cause against defendant, and that said case should be by said court dismissed for the reason that the petition shows upon its face that the plaintiff is a foreign corporation, and that the contract for the exploita-

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tion and sale of plaintiff's goods in the state of Oklahoma, and that said petition does not allege nor aver that said corporation has complied with the laws of the state of Oklahoma with reference to foreign corporations as provided by Snyder's Statutes of Oklahoma, being sections 1541, 1542, and 1543. Further, that defendant avers and alleges that said corporation has not complied in manner or form with the sections of Snyder's Statutes of the Compiled Laws of the state of Oklahoma, as above set out."

Counsel for the company objected to the filing of this supplemental answer, and excepted to the ruling of the court permitting it to be filed, and after it was filed demurred to the same on the ground that it did not state facts sufficient to constitute a defense to the action or to bar the right of the plaintiff to maintain the action. This demurrer was sustained by the court, and exceptions taken by counsel for Kibby. At the close of the testimony counsel for Kibby obtained permission of the court to dismiss his cross-petition and claim for damages, leaving the cause standing upon the issues formed by the petition and general denial thereof. Then counsel for the company moved the court to instruct the jury to return a verdict for the plaintiff. The motion was granted, and the verdict rendered accordingly. After the overruling of the motion for a new trial presented by counsel for Kibby, judgment was entered on the verdict of the jury in favor of the company for \$3,064.28. From this judgment Kibby appealed.

The one assignment of error argued challenges the ruling of the court in sustaining the demurrer to the supplemental answer as hereinbefore set out.

It is clear from the record that the ruling of the court in sustaining the demurrer to this supplemental answer was correct, and may be sustained on any one of a number of grounds.

First. The supplemental answer was not filed until after the defendant had answered to the merits, and thereby admitted the capacity of the plaintiff to maintain the action. As was said by Mr. Justice Hayes, in rendering the opinion of the court in *Jantzen v. Church*, 27 Okla. 473, at page 475, 112 Pac. 1127, at page 1128 (Ann. Cas. 1912C, 659):

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“By pleading to the merits, and without raising the question of plaintiff’s capacity, he admitted its capacity to maintain the action.”

See, also, *White Sewing Machine Co. v. Peterson*, 23 Okla. 361, 100 Pac. 513; *Engle v. Legg*, 39 Okla. 475, 135 Pac. 1058.

Second. Even if this supplemental answer had been filed in proper time, it did not state facts sufficient to constitute a defense to the cause of action set out by the plaintiff, or to deny the right of the plaintiff to maintain the action. These sections are reproduced as sections 1338, 1339, and 1341, Rev. Laws 1910, and they did not become effective until June 10, 1909, and since the statutes were evidently not intended to be retroactive in effect, they could not possibly affect the rights of the parties accruing under a contract executed on the 17th day of April, 1909, prior to the taking effect of the statutes.

Third. Again, the facts set out in this supplemental answer are not sufficient to show that the plaintiff was within the terms of the statute, or that it was such a corporation as was intended by the statute to be denied the right to maintain an action in the courts in this state. *Freeman-Sipes Co. v. Corticelli Silk Co.*, 34 Okla. 229, 124 Pac. 972; *Chicago Crayon Co. v. Rogers et al.*, 30 Okla. 299, 119 Pac. 630.

Fourth. Again, this action was based upon a contract of employment entered into by a foreign corporation and its agent. In any event the making of this contract at St. Louis with one who was referred to as a citizen of “the city of St. Louis” could not be said to be doing business in the state of Oklahoma, within the contemplation of the statutes of Oklahoma denying a foreign corporation a right to sue in its courts who had not complied with the provisions of the statute requiring that a copy of its charter be filed with the Secretary of State of Oklahoma and a service agent be appointed in Oklahoma. It seems that the case of *Verdigris River Land Co. v. Stanfield et al.*, 25 Okla. 265, at page 271, 105 Pac. 337, at page 339, is a controlling decision on the question involved in this case. In that case an Indiana corporation entered into a contract with Stanfield, a citizen of the state of Oklahoma, for the purchase of lands in Ok-

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lahoma, and his compensation, as provided by the terms of the contract, was to be oil and gas mining leases covering the lands purchased. The action in that case was based upon this written contract, and a similar defense to that attempted to be set up in this supplemental answer was made therein. Mr. Justice Kane, in the course of the opinion, said:

"The transaction thus necessary to inquire into in order to compel the agents of the corporation to account to them would be the contracts between the corporation and the citizens and residents of the Indian Territory that were made in relation to the lands and money in controversy. These transactions were not void except at the option of the citizens and residents of the Indian Territory with whom they were made, and, as far as the record shows in this case, they are not complaining. The defendants purchased certain lands from these citizens and residents of the Indian Territory with money belonging to the corporation, taking the deeds in the name of the defendant Stanfield, who thereafter conveyed an undivided one-half interest in them to Henry. The fiduciary relation of the defendants to the corporation is admitted; one Henry being the president, and Stanfield, an agent employed for the purpose of making the purchases. The contract of the corporation with its agent, Stanfield, which they claim to be void and under which they seek to avoid an accounting, is a contract of employment between Stanfield and the corporation, executed in the state of Indiana. We are of the opinion that the part of the provision pertaining to foreign corporations which provides that, unless they comply with the provisions of the law in relation to filing their certificates, etc., all their contracts with citizens and residents of the Indian Territory shall be void as to the corporation does not have reference to contracts entered into between the corporation and its fiduciary agents; the purpose of the statute obviously being to protect citizens of the territory in transacting business with foreign corporations, and not to offer opportunity to the fiduciary agents of foreign corporations to neglect to comply with the law, and then exploit the corporation. The corporation must act through its agents, and would be a helpless entity, indeed, if its chief executive officer could, by his neglect to comply with a provision of the law, enrich himself, and then find protection behind the statute."

Fifth. Again, the business in which Cubie, Heimann & Co. were engaged was interstate commerce. Of this there is no doubt.

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Freeman-Sipes Co. v. Corticelli Silk Co., 34 Okla. 229, 124 Pac. 972; *White Sewing Machine Co. v. Peterson*, 23 Okla. 361, 100 Pac. 513; *Chicago Crayon Co. v. Rogers*, 30 Okla. 299, 119 Pac. 630; *Harrell v. Peters Cartridge Co.*, 36 Okla. 684, 129 Pac. 872, 44 L. R. A. (N. S.) 1094; *Western Union Tel. Co. v. Kansas*, 216 U. S. 28, 30 Sup. Ct. 190, 54 L. Ed. 366; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 236, 92 N. E. 248, 137 Am. St. Rep. 322.

The Legislature of Oklahoma was without power to deny a foreign corporation engaged in interstate commerce the right to maintain suits in the courts of this state. It cannot be contended that such was the purpose of the statutes under consideration, for the Legislature clearly recognized the limitation upon its power in this respect in section 1340, Rev. Laws 1910, as follows:

"This article shall not be effective in cases where its enforcement will conflict with the powers of Congress or the federal laws to regulate commerce between the states."

It appears from the record that Mr. Kibby sought the employment with Cubie, Heimann & Co. repeatedly before the contract in suit was entered into; that he entered into this contract voluntarily for the term of one year, and refused to avail himself of the opportunity given him to rescind the contract prior to that time. Then, when the result was not as he expected, or as satisfactory as he had contemplated, he cannot escape the burdens of the contract in the manner he has attempted to do, after having enjoyed its benefits. He can find no protection behind this statute, even if he had properly pleaded its provisions.

It follows that the assignment urged is not well taken, and that the judgment appealed from should be affirmed.

By the Court: It is so ordered.

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No. 3189. Opinion Filed December 20, 1913.

(137 Pac. 346.)

1. **APPEAL AND ERROR—Granting New Trial.** The ruling of the trial court in setting aside the verdict of the jury and granting a new trial will not be disturbed on appeal, unless it clearly appears from the record that the trial court erred in a pure, simple, and unmixed question of law and but for such error would not have so ruled.
2. **SAME—Law of Case—Subsequent Proceedings.** The opinion in a cause appealed to this court and remanded for further proceedings is the law of that case in the trial court as well as in this court on any subsequent appeal.

(Syllabus by Galbraith, C.)

Error from District Court, Muskogee County;
R. P. de Graffenreid, Judge.

Action by H. P. Showalter against B. V. Leonard, administrator of the estate of Granville Ryles, deceased. Judgment for defendant, and, from an order granting a new trial, he brings error. Affirmed.

Benjamin Martin, Jr., for plaintiff in error.

S. B. Dawes, for defendant in error.

Opinion by GALBRAITH, C. This is the second time this cause has been before this court. An opinion was handed down on the first appeal September 25, 1908, and is reported in 22 Okla. 329, 97 Pac. 569. An examination of that opinion will show that the question presented on that appeal was whether or not the assignee of an agricultural lease could maintain an action of forcible detainer against the tenant of the lessor, holding over after the expiration of his term under the statutes of Arkansas in force in the Indian Territory. Although Mr. Justice Kane, speaking for the court in rendering the opinion, said:

"The complaint in the case at bar not only alleges a purchase of the lease under which the appellee went into possession by the appellant, but also the purchase of the land itself."

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The two decisions of the Supreme Court of Arkansas cited as authority for that decision were *Johnson et al. v. West*, 41 Ark. 535, and *Ish v. Morgan, McRea Co.*, 48 Ark. 413, 3 S. W. 440. In the Johnson case the Supreme Court of Arkansas held that "the tenant can no more resist the title of the lessor when asserted by or in the hands of the assignee than when it is held by the lessor himself"; and in the Ish case the court held that the mortgagee of the leased premises, who purchased the lands at a foreclosure sale, may maintain forcible detainer against the tenant of the mortgagor holding over after the expiration of his term. From the holdings of the Supreme Court of Arkansas in these two cases, relied upon by this court, in deciding the former appeal, it is clear that the law of the case, as declared by this court, is that Showalter, as the assignee of the lease, could maintain the action of forcible detainer against Ryles by reason of the purchase and assignment of the lease. This being the case, as declared on that appeal, it is the law of the case in all its subsequent stages, both in the trial court and in this court on any subsequent appeal. *Harper v. Kelly et al.*, 29 Okla. 809, 120 Pac. 293. This being true, and the law of this case being thus declared, it is not important that the pleading under consideration in the first appeal based the plaintiff's right to maintain the action on the assignment of the lease and the subsequent purchase of the premises, and that on the second trial in the district court the plaintiff abandoned his claim under the purchase and based his right altogether upon the purchase and assignment of the lease, since the court, in declaring the law in the case, held that the claim under the assignment of the lease was sufficient to entitle him to maintain the action.

In the trial of the cause, after the plaintiff had introduced his evidence, the defendant demurred to it and this demurrer was overruled. He then moved the court for an instructed verdict in his favor, and this was overruled, and the cause was then submitted upon the plaintiff's evidence and a verdict returned for the defendant. The plaintiff then filed a motion for new trial, which motion was by the court sustained. The defendant appealed and assigned as error the ruling of the court in refusing

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an instructed verdict, and the overruling of the demurrer to the plaintiff's evidence, and the order granting a new trial, and the ruling of the court in admitting certain evidence. It is clear from an examination of the record that the ruling of the trial court in overruling the demurrer to the plaintiff's evidence and refusing to instruct a verdict for the defendant was right, since there was introduced competent evidence to show that the plaintiff in February, 1903, purchased the lease from the defendant's landlord, having some two years to run, and that the defendant was notified of this purchase. There was evidence, as shown by the record, sufficient to make out a *prima facie* case for the plaintiff—evidence sufficient, if not contradicted, to entitle him to a verdict and ample to support a verdict if returned for him. The court did not err in overruling the demurrer to the evidence and in refusing to instruct the jury to return a verdict for the defendant.

Under the assignments of error relative to the admission of the evidence, but one instance is referred to; that is the admission of a copy of the lease without the proper certificate attached thereto. The copy was not properly certified in order to entitle it to be admitted in evidence; still this error was immaterial. The defendant was not injured by it, as the verdict of the jury clearly demonstrates. Then the contents of the lease were not material anyway. The only material point about the lease was whether or not it had been assigned to the plaintiff and the length of time it had run, and these facts were established by other testimony aside from this copy.

As to the assignments challenging the action of the court in vacating and setting aside the verdict of the jury and granting a new trial, the rule is well established in this jurisdiction that such rulings will not be disturbed unless it is made clear that the trial court "manifestly and materially erred with respect to some pure, simple, and unmixed question of law," and but for such errors would not have so ruled. See *Ardmore Lodge No. 9, I. O. O. F. v. Dawson et al.*, 33 Okla. 37, 124 Pac. 66, and cases therein cited; *Hughes v. C., R. I. & P. Ry. Co.*, 35 Okla. 482, 130 Pac. 591.

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Four separate grounds are set out in the motion for new trial. It does not appear whether the court granted the motion for new trial on one or all of them. We are unable to say that the court in vacating the verdict and granting a new trial erred in a simple, pure, and unmixcd question of law, and but for that error would not have so ruled. We are rather inclined to the opinion that the trial court exercised wisely the discretion vested in it in this instance.

It therefore follows that the judgment appealed from should be affirmed.

By the Court: It is so ordered.

BIG JACK MINING CO. v. PARKINSON.

No. 3195. Opinion Filed December 20, 1913.

(137 Pac. 678.)

1. **MASTER AND SERVANT—Mine Employees—Duty of Operators.** Sections 3983 and 3984, Rev. Laws 1910, prescribing certain duties of mine operators towards employees, including the duty of daily inspection, applies to the operators of lead and zinc as well as coal mines.
2. **DEATH—Right of Action—Parties.** An action for damages for wrongful death of the husband may be maintained by the surviving wife for the benefit of herself and minor children, under section 5281, Rev. Laws 1910, where there has been no administration on the estate of the deceased.
3. **SAME—Measure of Damages.** In such action the measure of damages is the pecuniary loss suffered by the widow and minor children by reason of being deprived of the care, protection, and support of the deceased, to be determined by the age, physical condition, occupation, earning capacity, habits, and the use made by the deceased of his earnings.
4. **APPEAL AND ERROR—Harmless Error—Instructions.** "Whether, in a given case, there should be a reversal for error in giving an instruction depends quite as much upon the evidence before the jury to which the instruction might be applied as upon the abstract accuracy of the language of the instruction, and so, if it is apparent that the language of the instruction, though inaccurate, yet, when applied to the evidence before the

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jury, it could not have misled the jury to believe their duty was different from what it actually was, the inaccuracy can afford no reason for reversal."

(Syllabus by Galbraith, C.)

*Error from District Court, Ottawa County;
Preston C. Davis, Judge.*

Action by Ella Parkinson against the Big Jack Mining Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Vern E. Thompson, G. W. Earnshaw, and F. D. Fulkerson,
for plaintiff in error.

W. H. Kornegay, for defendant in error.

Opinion by GALBRAITH, C. This is an action commenced in the district court of Ottawa county, by the widow, for damages for the wrongful death of the husband, resulting in deprivation of protection, care, and means of support. The petition charges, in brief, that on the 6th day of July, 1910, the Big Jack Mining Company was operating a lead and zinc mine in Lincolnville, in Ottawa county, Okla.; that for some months prior to the 1st day of July, 1910, the mine had been shut down, and had become filled with water, and that the water was pumped out the latter part of June, and the active operation of the mine commenced about the 1st of July, 1910; that Andrew F. Parkinson was employed as a miner to work in said mine; that there was a drift in the mine some 250 feet in length, and at one time this drift had been timbered, but the company had carelessly and negligently allowed the timbers that formerly protected persons from loose rocks in the roof thereof to fall down, and that the defendant failed to replace these props, or to furnish timbers to make them; that said roof was some 20 feet from the bottom of the drift, and, on account of the height thereof, and the means of inspection afforded by the defendant, a person working in the drift could not inspect the condition of the roof, and ascertain the dangers from loose or hanging rock therein; that while the mine was idle it filled with water, and the roof in the drift became brittle, and the rocks therein liable to fall; that the com-

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pany placed Andrew F. Parkinson at work in said drift, knowing its dangerous condition, and without proper inspection, and that on the 6th day of July, 1910, while the said Parkinson was engaged in his regular work in said mine, and passing along said drift, with a can of dirt, conveying it toward the shaft, a large rock in the roof of said drift gave way and fell upon said Parkinson, crushing, mutilating, and mortally injuring him, from which injuries he, a short time thereafter, died; that he was ignorant of the dangerous condition of said drift, and had no means by which he could ascertain its dangerous condition, and was relying upon the defendant to furnish him a safe place to work; that the defendant not only negligently failed to inspect the said drift and the roof thereof, as required by the statute to do, but knowingly placed the deceased to work therein without taking any care or precaution to ascertain that it was a safe place in which to work; that the deceased was at the time of his death a resident of Ottawa county, Okla., and was a vigorous young man, 26 years of age, capable of doing all kinds of manual labor, and was earning the sum of \$75 per month, which he used in the support and maintenance of the plaintiff and her minor children; that the plaintiff is the surviving widow of Andrew F. Parkinson, deceased; and that there had been no administration on his estate, and the plaintiff prosecutes this action for damages for the benefit of herself and her three minor children.

The answer of the defendant was, first, a general denial, and, second, alleged that the defendant exercised due care and diligence in warning the deceased of the hazards incident to his employment; that when he was employed he represented himself to be, and the defendant believed him to be, a capable miner of many years' experience in underground work in lead and zinc mines; that when he was employed he undertook the duty of trimming and sounding the roof and walls of the drift in which he was working, and to keep the same in a safe condition; and that a short time prior to the accident the deceased did inspect and examine the roof and walls of said drift, and declared the same to be in a safe condition, and that thereafter he continued to work, and was constantly warned to examine the roof and walls

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of the drift and to keep the same free from dangerous rocks, and requested to report the condition to the ground boss or superintendent—and specially denied that the accident was due to the mine having been filled with water or the removal of the timber, and alleged that the defendant furnished him with every safeguard and convenience for the pursuit of the work assigned him, and that the injury was not caused by the negligence of this defendant or its servants, but was due to his own negligence and fault, and was a risk incident to the work which he assumed by his employment. The new matter alleged in the answer was specially denied by way of reply.

On the issues thus formed, the cause was tried to the court and jury and a verdict returned for the plaintiff in the sum of \$10,000. A motion for new trial was denied. Judgment was entered upon the verdict. An appeal to this court has been duly perfected.

Errors are assigned, first, in overruling the motion for new trial; second, that the verdict is not sustained by the evidence, and is contrary to law; third, that the verdict is excessive; fourth, in the giving of instructions Nos. 4, 5, 6, 7, 8, 9, 10, 16, and 17; and, fifth, refusing to give instruction No. 1, requested by the plaintiff in error.

While these are the assignments made in the petition in error, counsel for the plaintiff in error confine their argument and discussion in the brief entirely to the instructions excepted to and given by the court. Under the rules of this court, we are only called upon in passing upon the case to consider the errors argued in the brief.

In instruction No. 4, complained of, the court directed the jury as to the law of contributory negligence and assumption of risk, and in so doing practically adopts the language of the statute on this subject. This practice is not objectionable, and it does not appear that the court was called upon to improve or enlarge upon the language used by the Legislature in the statutes in stating the law on these propositions.

Again, complaint is made of instruction No. 5, which reads as follows:

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"Under the laws of this state applicable to the case at bar, it was the duty of the defendant to provide a mine foreman, and it was the duty of said mine foreman or his assistant to visit and examine every working place in the mine where the deceased, in the performance of his duty, was required to go, at least once every day, and it was the duty of said foreman or his assistant to direct that each and every place where the deceased, in the performance of his duty, was required to work should be properly secured by props of timbers, and it was further the duty of such mine foreman or his assistant to direct that the deceased be not permitted to work in an unsafe place except for the purpose of making the place safe, and, if you find from the evidence that as a result of the failure to make this daily inspection the injury occurred, the defendant is liable therefor, unless you should find that the deceased was guilty of negligence which caused the injury."

It was evidently the intention of the court in giving the above instruction to advise the jury of the duty which the defendant owed the deceased, as prescribed by sections 3983 and 3984, Rev. Laws 1910. This is conceded by the plaintiff in error; but it is contended that these sections of the statute apply only to operators of coal mines, and have no application to persons operating lead and zinc mines, and for that reason the instruction should not have been given. We cannot agree with the labored argument of counsel that these sections of the statute were intended by the Legislature to protect only workers in coal mines. That such was not the intention of the Legislature seems evident from even a casual examination of the statute. These sections are found in chapter 47, Rev. Laws 1910, being a part of article 3 thereof. This chapter is entitled "Mines and Mining." Article 1 of said chapter creates a State Mining Board, and provides for mine inspectors and divides the state into three mining districts, in one of which every county of the state is included; Ottawa county, where the injury involved in this case occurred, being included in the Third mining district thus created. Then we find in section 3958 the language, "any coal or other mine," and in section 3961, "any coal or other mine;" in section 3977, "coal or other mineral;" section 4008, "every coal or other mine;" section 4009, "every coal or other mine." We do not

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believe that the Legislature intended to provide with such minute care for the protection of workers in coal mines, and to leave similar workers in lead and zinc mines without any protection whatever, particularly when these statutes bear such conclusive evidence that they were intended by the Legislature to protect the laborer not only in coal mines but in every other mine that may be operated within the state. We are constrained to hold that the trial court correctly interpreted the meaning, purpose, and intent of the Legislature in enacting these statutes, and in holding that the duty imposed on the operator of a mine thereby was a duty that the plaintiff in error owed to the deceased in this instance. While the statement of the latter part of the instruction in regard to the negligence of the deceased contributing to the injury may be objectionable as a general statement of the rule of contributory negligence, still, under the evidence in this case, the plaintiff in error could not have been injured by such careless statement, since practically all of the evidence showed that Parkinson was not negligent, and that his death was due primarily to the negligence and carelessness of the plaintiff in error and its foreman. The evidence of the foreman himself, whose duty it was, under the statute, to inspect the mine daily, testified that the last time he had inspected this shaft was some two weeks before the accident resulting in the death of Parkinson. The evidence not only showed this carelessness and negligence on the part of the mine foreman, but it further showed that he put men to work in this mine immediately after the water was pumped out of the shaft, which was located on the 90-foot level, before the shaft was dry, and when he knew that the shaft was not in a safe condition, by reason of the mine having recently been filled with water, and standing in that condition for months prior to that time; that some of the timbers and props fell, and they were not replaced, but were simply thrown to one side of the shaft, and the work of mining proceeded. And it also appeared that there had been blasting in the mine the night preceding the day on which Parkinson was killed, and that the place where the stone fell from the roof of the shaft upon Parkinson was only some ten or fifteen feet from where the shaft passed through

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dirt into shale rock, and through this shale formation were layers of soapstone, certainly a very unsubstantial character of formation to leave without props or support. The evidence of the defendant alone would have supported a verdict for the plaintiff on account of defendant's negligence.

Again, complaint is made of the giving of instruction No. 7, which was on the burden of proof, and instructed the jury that while, under the law, the burden of proof was upon the plaintiff to prove her cause of action by a preponderance of the evidence, yet, if they should find from the evidence that the same preponderated in the plaintiff's favor but slightly, that would be sufficient to warrant them to find the issues in her favor. The language of this instruction is possibly not fortunate, and the instruction might be misleading in the form given, yet, under the evidence as disclosed by the record, it is clear that the plaintiff in error could not possibly have been prejudiced by it, for the reason that the evidence of the company's negligence was so clear that this instruction as to a slight preponderance was entirely uncalled for, and the error in giving it was not prejudicial, and therefore not cause for reversal.

Again, complaint is made of the giving of instruction No. 8, in which it is urged that this instruction singled out one duty of the plaintiff in error, and impressed it upon the minds of the jury. It may be said that the court was not called upon to include all of the duties imposed upon the defendant in one instruction, and it does not seem objectionable that only one of its duties was embraced in this instruction.

Complaint is made of instruction No. 9, which advised the jury as to the law making it the duty of the plaintiff in error to provide a reasonably safe place for the deceased to work. In a carefully prepared opinion by Harrison, C., the law of this question is set out as follows:

"In 20 Am. & Eng. Enc. of Law (2d Ed.) 55, we find the following text supported by more than 200 decisions from 37 different states, and from the United States Supreme Court, and the courts of Canada and England, viz.: 'In accordance with the rule that reasonable care must be taken to protect one's servants from injury, masters owe to their servants the duty of

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providing them with a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of services required, and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and it is not one of the perils or risks assumed by a servant in his contract of employment and the servant is entitled to rely upon the assumption that the master has performed the duty imposed on him by law of providing a reasonably safe place to work.' In 26 Cyc. 1097, the following rule is stated: 'It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities wherewith, and place wherein, to do his work, and, in the performance of these obligations imposed by law, it is essential that regard should be had, not only to the character of the work to be performed, but also to the ordinary hazards of the employment; and the servant may assume that the master has performed his duty.' This rule is supported by decisions from 43 states, and from the United States Supreme Court, and the courts of England and Canada. Our own court, in the case of *McCabe & Steen Construction Co. v. Wilson*, 17 Okla. 355, 87 Pac. 320, uses the two terms interchangeably, or treats the terms as having the same legal effect. In the course of the opinion, the court quotes from *Ruemmeli-Braun Co. v. Cahill*, 14 Okla. 422, 79 Pac. 260, as follows: 'It is the positive duty of the master to use reasonable care in providing safe tools, machinery, and appliances to work with, and a safe place to work in, safe material to work on.' And after quoting the above language, the court says: 'As above stated, it is now the fundamental and well-settled law of the land that it is the duty of the master to furnish the servant safe tools, materials, and structures to work with and upon, and to keep them in proper repair.' " (*Frederick Cotton Oil & Mfg. Co. v. Trover*, 36 Okla. 723, 724, 129 Pac. 747, 749.)

This instruction is a fair statement of the law and the duty imposed upon the master thereby.

Complaint is also made of instruction No. 10, by which the jury were advised that the defendant relied upon the defense of contributory negligence, that this was an affirmative defense, and the law required them to establish it by a preponderance of the evidence, and, in the absence of such evidence, the law presumed that the deceased acted with due care. This instruction

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fairly states the rule as announced by this court in *St. L. & S. F. Co. v. Rushing*, 31 Okla. 231, 120 Pac. 973, where it is announced that:

"The servant is not charged with the duty of inspection. He is entitled to rely upon the assumption that the master has performed his duty."

See, also, *Frederick Cotton Oil & Mfg. Co. v. Trover*, *supra*.

Again, complaint is made of instruction No. 16, which reads as follows:

"The measure of damages in this case, in the event you find the defendant to be liable, is the pecuniary loss suffered by the plaintiff and the minor children by reason of the loss of the deceased. You cannot allow for grief or anguish of mind arising from the death of the deceased; but you may take into consideration the position the deceased occupied, and the support and protection that he would have afforded to the plaintiff and her minor children had he lived, and, in arriving at this, you will take into consideration his earning capacity, physical condition, his habits, and all the surrounding circumstances as you find them to be from the evidence."

The petition alleged the wrongful death of the husband by the negligence of the defendant, and that there had been no administration on his estate, and that he was a resident of Ottawa county, Okla., at the time of his death, and that the plaintiff was his surviving widow, and also set out the names of his minor children, clearly bringing the right of the plaintiff to maintain the action within the provisions of section 5281, Rev. Laws 1910, and it will be observed that this section provides, "the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." It appears that the action was rightfully brought by the widow, and that the measure of damages was correctly stated in the above instruction, under the rule announced in the following authorities: *Oklahoma Gas & Electric Co. v. Lukert*, 16 Okla. 397, 84 Pac. 1076; *Western Union Tel. Co. v. McGill*, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818; *Bartlett v. Chicago, R. I. & P. Ry. Co.*, 21 Okla. 415, 96 Pac. 468.

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Lastly, complaint is made of the giving of instruction No. 17, which advised the jury that it was not the duty of the deceased to inspect the roof of the drift in which he was employed; that he had a right to rely upon the presumption that the defendant had performed its duty as to inspection, since the sections of the statute herein referred to make it the duty of the operator to inspect the mine daily, and the provisions of section 4014, Rev. Laws 1910, make it a misdemeanor to fail to perform this duty, and provide that the mine operator shall be liable in a civil action for any damages resulting from the failure to perform this duty. It would seem that this instruction was not misleading nor a misstatement of the law. *St. Louis & S. F. R. Co. v. Rushing*, 31 Okla. 231, 120 Pac. 973.

In the case at bar the court gave 25 instructions, and evidently made an earnest effort to cover every feature of the case, and, while this duty may have been performed with more elaboration than is necessary, and some of the instructions may be open to just criticism, still, considered as a whole, taking those excepted to by the plaintiff in error as well as those not excepted to, it seems that the law of the case arising under the issues presented by the pleadings and the evidence admitted at the trial was fairly stated to the jury. We do not find that the verdict of the jury in this case should be set aside, and a new trial ordered, although some of the instructions of the court were not model statements of the law. Mr. Justice Schofield, in the case of *Bressler v. People*, 117 Ill. 422, 8 N. E. 62, quoted with approval by the Supreme Court of Oklahoma Territory in *Hodge v. Territory*, 12 Okla. 115, 69 Pac. 1077, 1079, said:

"It has often been said by this court—and its correctness is obvious although it might never have been said—that whether, in a given case, there should be a reversal for error in giving an instruction depends quite as much upon the evidence before the jury to which the instruction might be applied as upon the abstract accuracy of the language of the instruction, and so, if it is apparent that the language of the instruction, though inaccurate, yet, when applied to the evidence before the jury, it could not have misled the jury to believe their duty was different from what it actually was, the inaccuracy can afford no reason for reversal."

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So we find in this case that the evidence shows such careless and negligent failure to perform the duty of inspection by the plaintiff in error, when the inspection might have, and probably would have, avoided the accident resulting in the death of the deceased, and its liability is so clear, that, although some of the instructions which the court gave to the jury may have been inaccurate statements as abstract propositions of law, yet, when applied to the evidence before the jury, these could not have misled the jury to believe its duty was different from what it actually was, and we therefore find that the judgment appealed from ought to be affirmed.

By the Court: It is so ordered.

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No. 3255. Opinion Filed December 20, 1913.

(137 Pac. 675.)

1. **INSURANCE—Fraternal Benefit Society—Effect of Regulations—Contract of Insurance.** The terms of a contract between a fraternal benefit society and its members are to be determined by the constitution and laws of the society as they exist at the beginning of the membership, and as they may be lawfully amended from time to time thereafter, and by agreement made pursuant thereto between the incoming members and the society.
2. **SAME—Power to Change Regulations.** The power accorded to such a society in its charter to alter and repeal its constitution, by-laws, rules, and regulations enters into and forms part of the contract of insurance between the society and its members, when the latter, as applicants for membership, promise not only to conform to and abide by the constitution and laws of the society as they then exist but also as they may be thereafter altered or amended.
3. **SAME—Right to Change Regulations.** Such reserve power of amendment and repeal does not, however, give the society any right to adopt a by-law which will divest, impair, or disturb the rights once vested in its members, for such a by-law would be unreasonable.
4. **SAME—Fraternal Benefit Certificate—Rights of Beneficiary.** A beneficiary named in a fraternal benefit certificate only acquires a vested right in the benefits accruing thereunder on the member's death.

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5. **SAME—Fraternal Benefit Society—Amendment to By-Laws—Effect of Death of Beneficiary.** Though a benefit certificate, naming the member's mother as beneficiary, provided that, in case of death of the beneficiary before death of the member, and a failure by him to designate another beneficiary, the benefit should be paid to his heirs, and a like provision was in the by-laws in force when the certificate was issued; yet, it being provided in the application that the association's laws "now in force or hereafter enacted" enter into and become a part of every contract between it and a member and govern all rights thereunder, and it being declared by the by-laws a purpose of the association to furnish indemnity to the beneficiaries of members, "in accordance with the articles of association, by-laws, rules and regulations" of the association, not inconsistent with the laws of the state, a change in the by-laws, whereby, on death of the named beneficiary and failure of the member to make a new designation, his wife at the time of his death should take, in preference to his heirs, being reasonable and in harmony with the general purpose of the association, and not in derogation of any right secured to him, and fully authorized by the terms of the contract, governed.

(Syllabus by Galbraith, C.)

*Error from District Court, Kingfisher, County;
Jas. B. Cullison, Judge.*

Action by Maggie E. Hines against the Modern Woodmen of America and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

F. L. Boynton, for plaintiff in error.

Hinch & Bradley, for defendant in error Redmond.

Opinion by GALBRAITH, C. This was an action commenced in the district court of Kingfisher county, by Maggie E. Hines, widow of John Hines, deceased, upon a benefit certificate issued by the Modern Woodmen of America, a fraternal, beneficial association with an insurance feature, incorporated under the laws of the state of Illinois and authorized to do business in the state of Oklahoma. The certificate was issued to John Hines under date of March 1, 1901, and provided for the payment of \$1,000 to the beneficiary named therein, or the heirs, or widow, upon the death of John Hines. It was alleged in the petition that the deceased, John Hines, was a member of the Local Camp, Modern Woodmen of America, at Cashion, Kingfisher county, Okla., and that the certificate was issued to him, as provided by

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the constitution and by-laws of said society, and that he had complied with all the provisions of the contract on his part to be performed up until the time of his death on March 22, 1910; that said certificate at the time it was issued named as beneficiary Mary Hines, the mother of said deceased, and that Mary Hines died in January, 1905, prior to the death of said John Hines, and that John Hines never exercised the right given him by the by-laws of said society to nominate another beneficiary; that the by-laws of said association at the time said certificate was issued provided that in case of the death of the beneficiary named in the certificate prior to the death of the insured, and the insured failing to nominate another beneficiary, then the amount of the certificate should be paid to his heirs upon his death, but that prior to the death of said John Hines, to wit. in March, 1908, the by-laws of said association were regularly changed, providing that, in case of the death of the beneficiary named in the certificate and the failure of the insured to nominate another, the amount of the certificate should be paid to the surviving widow, if any; that this amended by-law controlled the disposition of the amount due under the certificate involved in this suit, and that thereunder the plaintiff, as the surviving widow, was entitled to the entire amount; that Mary Redmond, a sister of the deceased, and Daniel Hines, a brother, were claiming an interest in the proceeds of said certificate as the heirs of John Hines, deceased, and were not lawfully entitled to any part thereof; and that the defendant Charles Goetsinger, the duly qualified administrator of the estate of John Hines, deceased, was claiming the amount of said certificate, provided the same was due and payable to the heirs of deceased. The prayer was that the claim of these heirs and the administrator be denied, and that the entire amount of the certificate be adjudged due the plaintiff, as the widow, and that judgment be rendered accordingly against the defendant the Modern Woodmen of America.

It appears that Daniel Hines filed a disclaimer, as did also Charles Goetsinger, as administrator, and the Modern Woodmen of America filed an answer admitting the execution of the certificate and the death of John Hines, and that they owed on said

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certificate the sum of \$1,000; that demand was being made on them by the widow for the full amount and by the brother and sister of the deceased; and that they did not know which was entitled to payment, and asked for their own protection that the court determine to whom the amount should be paid, and offered to pay the amount of the certificate in to the clerk of the court in order that the court might direct the distribution thereof.

The case was submitted to the court for trial; the facts being admitted by stipulation of the parties. The court found that the allegations of the petition were true and concluded, as a matter of law, that the amendment to the by-laws of the Modern Woodmen of America, subsequent to the issuance of the benefit certificate, was inoperative to modify the terms of the certificate making the heirs of John Hines contingent beneficiaries in the event of the death of the beneficiary named before that of John Hines, and held that the amount of the certificate was payable to the heirs of John Hines, and entered judgment against the defendant Modern Woodmen of America in favor of the plaintiff for \$500 and in favor of Mary Redmond for \$250, and left \$250 of the amount due undisposed of by the judgment.

An appeal from the judgment was duly perfected to this court by Maggie E. Hines, and the only assignment of error is that the court erred in its conclusions of law in holding that the changes in the by-laws of the Modern Woodmen of America subsequent to the issuance of the certificate in suit was inoperative thereon.

Counsel for Mary Redmond argue that she, as an heir of John Hines, had a right in this certificate, and that the same became a vested right at the time of the death of Mary Hines, the beneficiary therein named, since the by-laws of the association at that time made the heirs the contingent beneficiaries upon the death of the beneficiary named and the failure of the insured to name another. We cannot agree with this contention, since the law is well settled that the beneficiary named in a fraternal benefit certificate only acquires a vested interest in the benefits accruing thereunder upon the member's death. *Holden v. Mod-*

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ern Brotherhood of America, 151 Iowa, 673, 132 N. W. 329; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Masonic Mut. Ben. Ass'n v. Severson*, 71 Conn. 719, 43 Atl. 192; *O'Brien v. Supreme Council*, 176 N. Y. 597, 68 N. E. 1120; *Miller v. Natl. Council, K. of L.*, 69 Kan. 234, 76 Pac. 830; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808, 90 N. W. 926; *Ross v. Mod. Bros.*, 120 Iowa, 692, 95 N. W. 207; *Pain v. Soc. St. J. B.*, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287. Prior to the death of the member, the right of the beneficiary is intangible and purely contingent, depending upon the chance of the beneficiary being changed either by the act of the member or by the association prior to the death of the member.

The application for membership in the society made by John Hines provided, among other things, as follows:

"I further understand and agree that the by-laws of this society now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members and the society and govern all rights thereunder."

And also:

"I further agree that the foregoing answers and statements, together with the preceding declarations, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof; and that they shall be construed together as one entire contract."

The Supreme Court of Connecticut said in regard to this question:

"The power of amendment thus reserved gave the order the right to change its laws, so long as these were not contrary to law or unreasonable; and the terms of the contract of insurance with its members made such changes a part thereof. *Gilmore v. Knights of Columbus*, 77 Conn. 58, 61, 58 Atl. 223 [107 Am. St. Rep. 17, 1 Ann. Cas. 715]; *Reynolds v. Royal Arcanum*, 192 Mass. 158, 78 N. E. 129 [7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776]. The promise of the members is to abide by all by-laws then existing or thereafter adopted which carry out the purposes

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of the order or help fulfill its obligations arising through its contracts of insurance." (*Kane v. Knights of Columbus*, 84 Conn. 96, 105, 79 Atl. 63, 66.)

The Supreme Court of Missouri has recently passed upon this identical question in construing a similar contract of indemnity to that involved in this suit. In *Dieterich v. Modern Woodmen of America*, 161 Mo. App. 97, at page 103, 142 S. W. 460, at page 461, it said:

"The by-laws of the defendant, providing for a substitute beneficiary in case of the death of the named beneficiary prior to the death of the member, were changed in 1901, and again in 1908, in both of which it was provided that in such a case the benefit should be first paid to the wife or widow, and, if no widow was left, then to other persons in the order therein named. The question for our determination is whether, under the amendment to the by-laws, made after this certificate was issued, by which, on failure of the named beneficiary and failure of the member to make a new designation, the wife at the time of the death of the member should take in preference to the heirs. This question must be determined by the construction of the contract between the association and its members, which is evidenced by the application for membership, the benefit certificate, and the by-laws of the association, as far as they are applicable. We first call attention to the expressed purposes of this association, as given in its by-laws in force at the time this certificate was issued. It is as follows: 'Purposes. The purposes of this society shall be, the affording of substantial benefits to and the promotion of fraternal relations among its members during life, and the furnishing of financial aid and indemnity to the beneficiaries of beneficial members (after death of such beneficial members), *in accordance with the articles of association, by-laws, rules and regulations of this society and not inconsistent to the laws of the state of Illinois.*' (Italics are ours.) It is here made a declared purpose of the association to do certain things and to do them in accordance with its own articles of association, by-laws, rules, and regulations. The member is presumed to know the provisions of the articles of association and by-laws of the association of which he is a member (*Harvey v. Grand Lodge A. O. U. W.*, 50 Mo. App. 472, 477; *McMahan v. Maccabees*, 151 Mo. 522, 537, 52 S. W. 384) and must have contracted in this case with full knowledge that the by-laws might be amended at any time, for they so provided. He also contracted with knowledge that it was the purpose of this association to perform its func-

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tions according to its own by-laws, rules, and regulations; and hence, if there was any feature connected with his purpose in becoming a member which, under the law, was subject to change, and which he wished to guard against possible change, he should have erected such guard in terms in his contract. As to the amount of the indemnity and the person to whom it should be paid, and his right to name a substitute in case of the death of the beneficiary, his rights were clear and beyond the power of the association to change against his will. The provision for disposition of the fund, in case of failure of the beneficiary and failure on his part to renominate the beneficiary, is not touched upon in his application for membership and indemnity. From this fact alone, it would appear that at the time he secured the certificate he only had in mind provision for his then wife, Frances Dieterich, for she was the only person he named in his application to whom he desired the indemnity paid. This application, like the certificate itself, was upon a blank form, evidently prepared by the association to conform to the by-laws, and the absence of any provision in the application for a substitute beneficiary is important as indicating the absence of any intention at the time on the part of the member to make provision for any one, except his then wife, and emphasizes the correctness of our position that it was the intention of the parties at that time to permit the question of a substitute beneficiary to be settled by the by-laws. The by-laws were changed during the life of the named beneficiary, and the change was in force at the time of Dieterich's marriage to plaintiff, and he must have known that fact; and if he wanted the benefit paid to his heirs, in preference to his second wife, to whom it would go under the by-laws as then in force, he could easily have made it so by naming them as substituted beneficiaries in the manner provided by the by-laws. Having failed to designate a new beneficiary, he must be held to have intended to let that matter be settled by the by-laws. Our conclusion is that the change in the by-laws was reasonable and in harmony with the general purposes of the association, and not in derogation of any right secured to the member, and was fully authorized by the terms of the contract between the member and the association. In so holding we are in harmony with the decided cases in this state. See *Lewine v. Supreme Lodge K. of P.*, 122 Mo. App. 547, 99 S. W. 821, where the authorities are reviewed, and the relation of the parties to each other and their respective rights are exhaustively treated. Also *Zimmerman v. Supreme Tent Knights of Maccabees*, 122 Mo. App. 591, 99 S. W. 817. The judgment in this case should have been for plaintiff."

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This decision of the Missouri Supreme Court leaves little, if anything, to be said upon the question, and its reasoning is so clear and convincing that we are constrained to adopt it and to hold it conclusive in favor of the contention made in the case at bar on behalf of the plaintiff in error. The association, under the express terms of its contract with John Hines, reserved the right to change and amend its by-laws and in that way change and modify its contract with him so long as such change was reasonable and fair. There can be no serious question about the change effected by the amendment of the by-laws of 1908; naming the surviving widow in place of the heirs as the beneficiary under the certificate was reasonable and fair and intended to uphold and advance the beneficial purposes of the association. The heirs have no legal right to complain at this change and are concluded thereby.

It follows that the conclusions of the trial court as to the law of the case were wrong. He should have found that the entire amount of the certificate should be paid to the surviving widow, and rendered judgment accordingly.

For these reasons the judgment appealed from should be vacated, and said cause remanded to the district court of Kingfisher county, with directions to enter judgment against the Modern Woodmen of America in favor of the plaintiff in error, Maggie E. Hines, for \$1,000.

By the Court: It is so ordered.

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No. 3288. Opinion Filed December 20, 1913.

(137 Pac. 682.)

1. **APPEAL AND ERROR—Time of Taking—Motion for New Trial—Necessity.** Where an action is tried before a referee who reports to the trial court findings of fact, and both plaintiffs and defendant move for judgment on such findings, these motions present questions of law only, and a motion for new trial is not necessary in order to have the judgment reviewed on appeal, and the time for

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appeal in such case runs from the date of the judgment, and the filing of the motion for new trial does not extend or suspend the running of the time for appeal or for service of a case-made.

2. **SAME—Case-Made—Delay in Filing.** A case-made not served within the time fixed by statute, or within the time as extended by the court before the expiration of the statutory time, is a nullity and cannot be considered on appeal.
3. **SAME—Record—Motion for New Trial—Review.** A motion for judgment on the findings of fact made by the referee, and a motion for new trial, and exceptions to the ruling of the trial court thereon, are not part of the record proper, and can be preserved and presented for review on appeal only by incorporating the same in a bill of exceptions or case-made.

(Syllabus by Galbraith, C.)

*Error from Superior Court, Oklahoma County;
Edward D. Oldfield, Judge.*

Action by Max Frank and others, doing business as the Michigan Leather Company, against V. Veverka. Judgment for plaintiffs, and defendant brings error. Dismissed.

J. H. Beaty, for plaintiff in error.

Scothorn, Caldwell & McRill, for defendants in error.

Opinion by GALBRAITH, C. This was an action commenced in the superior court of Oklahoma county by the defendants in error against the plaintiff in error on an account for merchandise alleged to have been sold and delivered. By agreement of the parties the case was referred to a referee for trial, to take testimony and return findings of fact and conclusions of law. The report of the referee was filed in the trial court on the 26th day of May, 1911. Both plaintiffs and defendant moved the court for judgment on the findings of fact made by the referee. The motion of the plaintiffs (the defendants in error) was granted on the 8th day of July, 1911, and judgment was entered in their favor on that date. The plaintiff in error, as defendant in the court below, filed a motion for new trial on the 10th day of July, 1911, which was overruled on the 12th day of August, 1911, and defendant asked and was given 60 days in which to prepare and serve case-made on appeal to this court, and on September 23, 1911, was given 30 days addi-

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tional time in which to serve case-made. The case-made was served on the 4th day of November, 1911, and was thereafter settled by the trial judge and filed in this court on November 11, 1911.

The errors assigned in the petition in error attached to the case-made are as follows: First, the action of the court in sustaining the plaintiffs' motion for judgment on the findings of fact; and, second, the overruling the motion for new trial.

The defendants in error insist that this court has no jurisdiction of the case, and move to dismiss the appeal on the ground that the case-made was not served within three days after the entry of judgment, or within the extension of time given before the expiration of the three days.

The record shows that the judgment appealed from was entered on the 8th day of July, 1911, and that the motion for new trial was overruled on the 12th day of August, 1911, and the extension of time was then given to make and serve case-made. It has recently been held by this court that, where a cause is tried on an agreed statement of facts, no motion for a new trial is necessary in order to a review of such judgment on appeal. *C., R. I. & P. Ry. Co. v. City of Shawnee*, 39 Okla. 728, 136 Pac. 591. It has also been held by this court that:

"Where a motion for a new trial is unnecessary to present to this court for review an order or judgment appealed from, such motion and decision thereon by the trial court are ineffectual to extend the time within which to perfect an appeal." (*Cowart v. Parker-Washington Co. et al.*, 40 Okla. —, 136 Pac. 153.)

We take it that the decision in *C., R. I. & P. Ry. Co. v. Shawnee*, *supra*, is controlling in this case, since both plaintiffs and defendant moved for judgment on the facts found by the referee, and each thereby said to the court, "We agree that these are the facts in this case, and upon these facts the law justifies a judgment in my favor;" and for that reason the motion for judgment presented to the trial court questions of law only, and that no motion for new trial was necessary to entitle the losing party to have such judgment reviewed upon appeal. Hence the time for serving a case-made, as fixed by the statute,

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commenced to run on the 8th day of July, 1911, the date of the entry of judgment in the cause; and since the case-made was not served within three days of that time, nor within the extension of time granted within such three days, the case-made is a nullity and presents no question for review to this court.

The record in this cause cannot be considered as a transcript, even if the certificate of the clerk thereto was sufficient, and this seems to be fatally defective, for the reason that the errors assigned in the petition in error challenge the ruling of the trial court on the motion of the defendant for judgment and the overruling of the motion for new trial. Neither of these motions is a part of the record proper, and neither has been made a part of the record in the manner provided by law. It has been held by this court:

“Motions presented in the trial court, including a motion for a new trial and the ruling thereon and exceptions taken, are not a part of the record proper and can be reserved and presented for review on appeal only by incorporating the same into a bill of exceptions or case-made.” (*Tribal Development Co. v. White Bros.*, 28 Okla. 525, 114 Pac. 736.)

The case-made being a nullity because not served within the time prescribed by the statute, and the errors assigned being based upon motions presented to the trial court, and these motions and the exceptions taken thereto not having been incorporated into a bill of exceptions, cannot be reviewed in this court on a transcript, for the reason that they are not a part of the record presented by the transcript.

For these reasons there is nothing in the record in this case that properly invokes the jurisdiction of this court, and the motion to dismiss the appeal should be sustained.

By the Court: It is so ordered.

St. Paul Fire & Marine Ins. Co. v. Bragg.

ST. PAUL FIRE & MARINE INS. CO. v. BRAGG.

No. 3305. Opinion Filed December 20, 1913.

(136 Pac. 715.)

INSURANCE—Action on Policy—Petition—Election to Cancel. In an action on a fire insurance policy containing the following clause: "This entire policy shall be void at the election of the company, if, without the consent of the secretary or general agent of the company indorsed thereon, any other insurance is now or shall be taken out on any of the property above described,"—where the answer alleges a violation of this clause by the insured in taking out additional insurance on the same property covered by the policy in suit, without the knowledge or consent of the company, but fails to allege a compliance with the terms of the policy which prescribes that in case the company elects to cancel the policy it shall do so "by returning to the assured the *pro rata* unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the assured," and does not allege payment or tender to the assured the *pro rata* unearned premium, and the giving of written notice to the assured, does not sufficiently plead an election on the part of the company to declare the policy void.

(Syllabus by Galbraith, C.)

*Error from District Court Comanche County;
J. T. Johnson, Judge.*

Action by G. W. Bragg against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Houston & Brooks and Chas. Mitschrich, for plaintiff in error.

H. C. Stubblefield and Hudson & Whalin, for defendant in error.

Opinion by GALBRAITH, C. The defendant in error, on November 30, 1909, instituted this action in the district court of Comanche county, against the plaintiff in error, on a fire insurance policy that had been delivered to the defendant in error, by the agent of the plaintiff in error, at Lawton, Okla., on the

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4th day of February, 1907, insuring his dwelling house and household effects against loss by fire in the sum of \$600. The petition alleged that the property insured was destroyed by fire on the 24th day of October, 1908, and that proof of loss had been furnished, as required by the terms of the policy, on the 27th day of October, 1908, and the plaintiff had performed all the conditions on his part to be performed, as prescribed by the terms of the policy, and that the defendant had failed to pay the same or any part thereof, and prayed for judgment in the sum of \$600 and costs. The defendant answered the plaintiff's amended petition, admitting that it executed and delivered the policy, as charged, but denied each and every other material allegation in the petition contained, and in the second paragraph of the answer set out that the policy issued as aforesaid contained, among other provisions, the following condition:

"This entire policy shall be void at the election of the company, if, without the consent of the secretary or general agent of the company indorsed hereon, any other insurance is now or shall be taken out on any of the property above described."

And charged that the plaintiff violated the terms of this condition of the contract, inasmuch as, after the issuance and delivery of the policy in suit, the plaintiff took out additional insurance on the property covered by said policy, without the knowledge or consent of the secretary or general agent of the defendant company, indorsed on the policy in writing, as in the above provision stipulated, attaching a copy of the second policy charged to have been issued to the answer; and further alleging "that said insurance was taken out without the knowledge or consent of the secretary or general agent of the defendant, and without any consent of said secretary or general agent being indorsed on said policy as provided by the terms thereof; that the defendant had no knowledge, notice, or information that said other and additional insurance had been taken out until long after the alleged destruction of said property by fire, as charged by the plaintiff in said petition; that, as soon as this defendant learned that said other and additional insurance as aforesaid had been taken out upon said property, it advised the plaintiff

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that said policy so issued by it to the plaintiff as aforesaid was void." And alleged that on account of the breach of such condition by the plaintiff the policy in suit became null and void, and no recovery could be had thereon. To this second paragraph of the answer the plaintiff interposed a demurrer, which was by the court sustained. The defendant excepted to the ruling of the court in sustaining the demurrer and refused to amend, electing to stand thereon. The cause was submitted to the court for trial upon the issues made by the petition and the first paragraph of the defendant's answer thereto, and judgment was rendered for the plaintiff for the full amount of the policy and interest. A motion for new trial was filed and overruled, and exception saved, and the defendant appealed to this court by petition in error and case-made.

The only assignment of error argued is that challenging the ruling of the trial court in sustaining the demurrer to the second paragraph of the answer, and that is all that is necessary to consider on this appeal. The law is well settled that a provision, such as that set out in the second paragraph of the answer above quoted, is a valid and binding provision in an insurance contract. The Supreme Court of the United States, in *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 317, 22 Sup. Ct. 136, 46 L. Ed. 213, said:

"Overinsurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies, rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable. In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued. It also was made to appear that no consent to such other insurance was ever indorsed on the policy or added thereto. Accordingly, it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the conditions."

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The Supreme Court of Kansas, in regard to the same provision, said that:

"Provisions in policies of insurance providing that the policies shall be void if other insurance be taken without the consent of the insurer are valid. 2 May, Ins. 364. And subsequent insurance, taken out without the consent of the insurer, either expressed or implied, avoids the policy. *Allen v. Merchants' Mutual Ins. Co.* [30 La. Ann. 1386] 31 Am. Rep. 243; *Funke v. Insurance Ass'n*, 29 Minn. 347 [13 N. W. 164, 43 Am. Rep. 216]; *Bard, Appellant, v. Penn Mut. Fire Ins. Co.*, 153 Pa. 257 [25 Atl. 1124, 34 Am. St. Rep. 704]."

See, also, *Assurance Co. v. Norwood*, 57 Kan. 615, 616, 47 Pac. 531.

Our own court, in at least two well-considered decisions, one by Ames, C., and another by Brewer, C., has recognized the validity of this clause in insurance policies. *Western Nat. Ins. Co. v. Marsh*, 34 Okla. 414, 125 Pac. 1094; *Merchants' & Planters' Ins. Co. v. Marsh*, 34 Okla. 453, 125 Pac. 1100.

However, we find the following clause in the policy in suit regulating rescission:

"This policy may be canceled by either party. If upon request of the company, by returning to the insured the *pro rata* unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the insured. If by insured, by paying the customary short rate for the time the policy has to run and the expenses of writing the risk."

This provision of the policy was not argued by counsel and was overlooked in the preparation of the original opinion, but a member of the court called attention to it with the suggestion that it ought to be considered, and for that reason the original opinion filed in this case was withdrawn and this one substituted.

It will be observed that the provisions of the policy first quoted provide that the taking of additional insurance on the property without the written consent of the company avoids the policy at the election of the company, and the provision last above quoted set out how the election of the company to avoid the policy shall be exercised, to wit, "by returning to insured the

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pro rata unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the insured."

It will be observed that the second paragraph of the answer, to which demurrer was interposed and sustained, fails to allege a compliance with these conditions. It fails to allege an offer or tender to the assured of the *pro rata* unearned premium or an indorsement of the amount thereof on any unpaid premium note, and the giving of notice in writing to the insured, and thereby fails to allege the necessary facts to constitute an election on its part to avoid the policy on account of taking the additional insurance, and the demurrer was therefore properly sustained, on authority of *Taylor v. Insurance Co. of North America*, 25 Okla. 92, 105 Pac. 354, 138 Am. St. Rep. 906. See, also, *St. Paul Fire & Marine Ins. Co. v. Peck*, 37 Okla. 85, 130 Pac. 805; *St. Paul Fire & Marine Ins. Co. v. Griffin*, 33 Okla. 178, 124 Pac. 300; *Rochester German Ins. Co. of Rochester v. Rodenhouse*, 36 Okla. 378, 128 Pac. 508; *Pacific Mutual Life Ins. Co. v. O'Neil*, 36 Okla. 792, 805, 130 Pac. 270; *Home Ins. Co. v. Dobbins*, 81 Miss. 623, 33 South. 504.

It follows that the assignment of error is not well taken, and that the judgment appealed from should be affirmed.

By the Court: It is so ordered.

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No. 3316. Opinion Filed December 20, 1913.

(137 Pac. 690.)

1. **USE AND OCCUPATION—Rents—Right to Recover.** In an action brought by the owner of real estate, entitled to the possession thereof, against the occupant, to recover for the use and occupation of the lands occupied, it is not necessary to allege in the petition either that the relation of landlord and tenant existed between the parties or that there was any contract between them, either express or implied, to pay rent.

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2. **SAME.** Under our statute (section 4094, Comp. Laws 1909 [Rev. Laws 1910, sec. 3802]), the occupant of lands is, without special contract, liable for the payment of rents to any person entitled to the same.

(Syllabus by Brewer, C.)

Error from District Court, Hughes County;
John Caruthers, Judge.

Action by John W. Gilliland against Nicholas V. Bilby. Judgment for plaintiff, and defendant brings error. Affirmed.

Lewis C. Lawson, for plaintiff in error.

Warren & Miller, for defendant in error.

Opinion by BREWER, C. The defendant in error sued the plaintiff in error in the district court; the petition being as follows:

"Petition. The plaintiff, John W. Gilliland, states that he is the owner of the S. W. $\frac{1}{4}$ of section 5, township 6 north, and range 9 east, in Hughes county, Okla., and that he was the owner of said land during all the year 1910 from the 15th day of January of the said year, and that at all time thereafter during the said year 1910 he was entitled to the possession of said land and to the rents from same; that the defendant, Nicholas V. Bilby, was wrongfully in possession of the said premises from the 15th day of January, 1910, until the crops for said year were gathered, and collected the rents on said land for said year of 1910; that the said Nicholas V. Bilby was not in possession of said premises with the consent of the plaintiff but held the same over his protest; that the said Nicholas V. Bilby collected the said rents and profits without the consent and over the protest of the said plaintiff, and that his said acts in holding possession of said lands and collecting the rents therefrom were wrongful and deprived plaintiff of the rents from said lands, and that plaintiff was damaged thereby; that the reasonable rental value of the said premises for the year 1910 was the sum of \$800. Wherefore the plaintiff, John W. Gilliland, prays judgment against the defendant, Nicholas V. Bilby, in the sum of \$800, for the costs of this action, and for all proper relief."

The defendant in the trial court interposed a demurrer to the petition, which was overruled, and he brings the case to this court on case-made to have this ruling of the court reviewed.

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The demurrer set up that the petition did not state a cause of action; that it was so indefinite and uncertain that its nature cannot be determined; that, if it is an action to recover rents, it is so indefinite and uncertain that it does not entitle the plaintiff to recover as prayed for therein.

We are unable to agree with the plaintiff in error. While this petition has not been drawn with care, and its averments may be open to criticism, yet we believe that the purpose of the suit can be easily gathered from the language used; that the facts stated, if true, show that the defendant has wrongfully held, occupied, and used plaintiff's land, and has wrongfully appropriated the rents and profits thereof to his own use, when in fact plaintiff was entitled to the same. This petition clearly shows that plaintiff was the owner of the lands and was entitled to the possession of the same and to the rents and profits thereof; that defendant was wrongfully in possession of the lands throughout the crop season of the year 1910 and actually took unto himself the rents and profits of the land for that period, all of which was done over the protest of plaintiff; that the reasonable value of the rents was a certain sum, and that plaintiff had been damaged to that extent.

We are fully aware that at common law, and under the law of many of the states, a suit of this kind would not lie in the absence of a contractual relation, express or implied, between the parties; but under our statute (section 4094, Comp. Laws 1909 [Rev. Laws 1910, sec. 3802]) the occupant of lands is made liable for rents to any person entitled thereto and without special contract. The case of *Earl v. Tyler*, 36 Okla. 179, 128 Pac. 269, is directly in point. In that case the syllabus is as follows:

"In an action brought by the owner of real estate, entitled to the possession thereof, against the occupant, to recover for the use and occupation of the lands occupied, it is not necessary to allege in the bill of particulars either that the relation of landlord and tenant existed between the parties or that there was an express or implied agreement to pay rent."

That case discusses the point quite fully and the view is therein expressed:

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"We are of the opinion that the Legislature intended to furnish a remedy, not alone to the landlords, within the usual legal meaning of the word, but to those entitled by reason of their title to remuneration for the use and occupation of lands occupied by another."

This holding is supported by *Story v. McCormick*, 70 Kan. 323, 78 Pac. 819, and *Winings v. Wood*, 53 Ind. 187, in which states the same statute is construed. *Rodman v. Davis*, 34 Okla. 766, 127 Pac. 411.

We think the petition states a cause of action and that the demurrer was properly overruled.

The cause should be affirmed.

By the Court: It is so ordered.

WALTERS NAT. BANK v. BANTOCK.

No. 3320. Opinion Filed December 20, 1913.

(137 Pac. 717.)

1. **BANKS AND BANKING—Deposit—Right to Appropriate—Trust Fund.** A bank generally has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor.
2. **ASSIGNMENTS—Check—Effect to Assign Deposit.** Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, **pro tanto**, of the fund before such check has been accepted or certified.
3. **SAME—Check on Particular Fund—Escrows.** Where the depositor of a trust fund in a bank enters into a contract with another person that such fund shall be deposited and held in escrow to insure the completion of a sale of land, and such parties go to the bank and fully disclose their intentions so to use the fund, and the bank advises both parties that a check for the amount of the fund will be paid, and to satisfy them thereof takes a check already executed for the full amount of the deposit, and writes into the face of the check "in escrow," and the check, in lieu of the money, is then placed with the contract in the hands of the bank's cashier to be held in escrow, pending the completion of the sale of the land, and which sale is later completed and

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the check is delivered over according to the escrow agreement, held, that the transaction operated as an equitable assignment of the fund; that there was privity between the bank and the payee of the check, who, upon the bank's refusal to pay the same, had a right to sue and recover the amount of the fund.

4. **TRIAL—General Finding—Construction.** A general finding by a jury in favor of a party includes a finding in his favor on all the material issues in the case.
5. **APPEAL AND ERROR—Verdict—Conflicting Evidence.** Where the evidence in a case is conflicting, the verdict of a jury thereon will not be disturbed, where the evidence and the inferences legitimately to be drawn therefrom support the verdict.
6. **CONTRACTS—Right to Enforce—Illegal Contract.** A lawful agreement between parties will be enforced, even though it may be incidentally or indirectly connected with a contract that is illegal, where such lawful agreement is supported by an independent consideration, and can be proven without the aid of the illegal contract.

(Syllabus by Brewer, C.)

*Error from District Court, Comanche County;
J. T. Johnson, Judge.*

Action by H. Bantock against the Walters National Bank, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Ray and Chas. Mitschrich, for plaintiff in error.

H. F. Tripp, I. K. Revelle, and Gray & McVay, for defendant in error.

Opinion by BREWER, C. The defendant in error, Bantock, as plaintiff below, sued the Walters National Bank for the sum of \$1,000, and upon a trial before a jury was given a verdict for the sum claimed. The defendant bank has appealed on case-made to this court.

Bantock employed the W. E. Wilson Realty Company, a copartnership, composed of W. E. Wilson and W. W. Graves, to sell a farm belonging to his mother-in-law. The realty company found a purchaser who lived in Nebraska, who agreed to take the farm for \$5,450, and sent to the realty company a draft for the sum of \$1,000 to be applied to the purchase. This draft arrived in Walters, Okla., October 28, 1907, simultaneously with

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what has been called the bankers' panic of that year. The farm proposed to be sold was a homestead entry, in the name of plaintiff's mother-in-law, and the final proof had not been completed; at least, title could not at the time be conveyed. As to the handling of the sale and the use of this \$1,000 draft out of which this suit arose, the evidence is conflicting. Plaintiff's evidence shows: That, when this draft was received, Mr. Sultan, the cashier of defendant bank, was shown the same and was told about the land sale and the purpose of the draft, and insisted that, as the bank needed exchange badly, the draft be deposited in the bank, and it could be used in the land trade through a check against it. That it was so deposited on October 28, 1907. That next day, plaintiff and the members of the realty firm went into the bank and showed the cashier a contract that had been entered into providing for the sale of the farm, one of the provisions of which was that each party, Bantock upon the one hand, and the realty firm on the other, should deposit \$1,000 to insure faithful performance of the contract of sale. To accomplish this the realty company executed its check for \$1,000 and Bantock executed his for a like amount, and these checks and the contract of sale were read and understood by the cashier of the bank. That one of the realty men and also Bantock asked the cashier if that check would be good for the money upon plaintiff's completing the sale, and that the cashier assured them it would, and stated he would fix it so it would be good, and, taking the check which had been already prepared, inserted in its face the words "in escroe." That the cashier then took the papers, put them in an envelope, and held them for the parties. About April, 1908, Bantock had the farm conveyed, in everything fulfilling the contract so to do, and the contract and checks were delivered to him by the bank. The check for the \$1,000 was presented, and the bank refused to pay it on the ground of "no funds." The bank explained the disappearance of the fund by saying that the \$1,000 deposited by the W. E. Wilson Realty Company had been appropriated by the bank towards the liquidation of the individual notes of the partners in the realty firm.

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The circumstances of the deposit of the \$1,000 are best told by W. E. Wilson of the realty firm, who, after stating that he received the draft from the purchaser of the farm in Nebraska, made payable to W. E. Wilson Realty Company, and told the cashier of the matter, says:

"A. Well, I told Mr. Sultan I had a draft there. I had been out to see Mr. Bantock, and he was to come in next day, and I told Mr. Sultan. * * * A. I told Mr. Sultan I had a \$1,000 draft for Bantock, and Mr. Sultan asked me to deposit the draft. I says, 'I don't feel like depositing the draft until he comes in and fixes the deal up,' but he says: 'You go ahead and deposit that draft, I want this draft in exchange.' * * * A. Well, I went and talked to Mr. Graves (his partner), and we deposited the draft in our name, but we had it understood with Mr. Sultan it was Mr. Bantock's money, and he told us we could check on this thousand dollars and close the deal next day," etc.

This deposit was the only one ever made by the realty company. The cashier of the bank in a way denies this evidence. The next day after making the deposit, the plaintiff, Bantock, also both Wilson and Graves, of the realty firm, testify that they went into the bank and met the cashier, Sultan, and explained the nature of the contract for the sale of the farm; showed him the contract, which he read; and Mr. Wilson states what was done as follows:

"A. When I and Mr. Bantock and Mr. Graves went to see Mr. Sultan about this deal, I says to Mr. Sultan, I says, 'Was our check good for a thousand dollars to Mr. Bantock?' and Mr. Sultan says, 'Most assuredly it is,' and Mr. Bantock asked him then if it is good, and he says, 'Give me the check and I will make it good,' and he takes it and wrote that word in there taking it to the desk, and took his pen and wrote that on the check, and Mr. Bantock accepted the check."

The words referred to as having been written in the check by the cashier are "in escroe." That this was written by the cashier to satisfy Bantock that the check would get the money upon the completing of the contract is positively stated by the three witnesses mentioned. Mr. Sultan denied writing the words in the check; in fact, he set up an alibi and disclaimed any knowledge, at the time, of the escrow agreement. For the purpose of

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comparison of handwriting, the cashier introduced a number of papers he had written in which the word escrow appears. The court and jury evidently had the benefit of a comparison of these writings with the one in dispute; but we have not the same opportunity, as nothing but typewritten copies are before us. Six of these exhibits have the word escrow on them spelled "escroe," as it was on the check in suit.

We do not understand this to be the usual way of spelling the word, and this circumstance that the cashier had spelled the word in this peculiar manner in the exhibits may have had weight with the jury. At all events, we take it the jury found against defendant on this point, as well as on the point that the cashier understood the nature and purposes of the draft deposited, whom it came from, and how it was to be used, and that it was not the property of the real estate firm, for the reason that a general finding in favor of a party by a jury includes a finding in his favor on all the material issues in the case.

The assignments of error go to: (1) The refusal of the court to direct a verdict for defendant. (2) The admission of incompetent evidence. (3) The refusal to give certain instructions. (4) The giving of certain instructions. The greater part of the brief is devoted to the first of these assignments.

Notwithstanding the vast amount of industry and ingenuity employed by appellant to convince this court otherwise, from a study of the facts of this case, it does not seem to us that many words are required to show that the bank can assert no justification in law or equity for withholding this deposit and appropriating it as has been done. Assuming that plaintiff's evidence is true, as evidently believed by the jury, the bank in receiving this deposit full well knew that it was not the property of the realty company; that in fact it was the property of the Nebraskan placed in trust with the realty company, to become the property of plaintiff, upon the completion of the sale of the land. Its trust character was well known, as well as the exact and specific use intended by the parties to be made of the fund. Yet the bank with this knowledge appropriated the fund, which it knew did not belong to the realty firm or either of the partners therein, to the payment of the notes owing by those individual partners. It had

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no right to do so, and acquired no title to the funds by reason of its attempted appropriation. The principle announced in the cases of *Shawnee Nat. Bank v. Wooten & Potts*, 24 Okla. 425, 103 Pac. 714, and *F. & D. Co. v. Rankin*, 33 Okla. 7, 124 Pac. 71, fully sustain the views above expressed. In the Rankin case, *supra*, the depositor of the trust fund joined the bank in an effort to appropriate the same to the payment of his individual indebtedness to it by executing his check in his trust capacity. But the court held that the bank could not thus acquire title to the money thus obtained, where it had knowledge of the trust character of the funds and that they were being improperly applied. In the Rankin case, *supra*, the authorities are collected, and it is not necessary to set them out again. There is nothing in *Forbes v. First Nat. Bank of Enid*, 21 Okla. 206, 95 Pac. 785, in conflict with the views expressed herein. But if it may be doubted that those expressions of our own court are fully applicable, and decisive of this case, we refer to the following authorities: *Judy v. Farmers' & Traders' Bank*, 81 Mo. 404; *Deal et al. v. Mississippi Co. Bank*, 79 Mo. App. 263; *Paul v. Draper*, 73 Mo. App. 566; *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343, 32 South. 716, 92 Am. St. Rep. 38; *Amer. Ex. Nat. Bank v. Mining Co.*, 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; *American Trust & B. Co. v. Boone's Adm'r*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; *Duckett v. Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; *Union Stockyards Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Parker v. Hartley*, 91 Pac. 465; *Jeffray v. Towar et al.*, 63 N. J. Eq. 530, 53 Atl. 182; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Jamison v. Howard Lockwood & Co.*, 26 Misc. Rep. 730, 56 N. Y. Supp. 1085; *Union Stockyards Bank v. Moore*, 79 Fed. 705, 25 C. C. A. 150; *Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413, 89 N. W. 1030; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906.

It having been determined that the bank's attempt to appropriate the deposit utterly failed, it still remains to be seen whether, under the circumstances, plaintiff has a cause of action for the amount of the deposit against the bank.

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Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, *pro tanto*, of the fund, before such check has been accepted or certified. *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 54 Pac. 434; *First Nat. Bank v. School Dist.*, 31 Okla. 139, 120 Pac. 614, 39 L. R. A. (N. S.) 655; section 4239, Rev. Laws 1910. And it seems the weight of authority is that the holder of such check cannot, ordinarily, maintain a suit thereon against the bank, for want of privity of contract (*Bank v. Millard*, 77 U. S. [10 Wall.] 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314); but whether our statute would change this general rule against the maintenance of such a suit need not be inquired into nor decided here, for reasons that will appear as we proceed.

A very clear discussion of the rule adverted to, admitting the exceptions which it is believed removes this case from its application, assuming the rule to prevail here, is found in two of the cases last cited (*Bank v. Millard*, *supra*, and *First Nat. Bank v. Whitman*, *supra*). In the *Millard* case, after discussing the rule and collecting the authorities, the court say:

"On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes him no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor."

In *First National Bank v. Whitman*, *supra*, Justice Hunt, for the Supreme Court of the United States, after holding:

"The payee of a check which has not been accepted by the bank on which it is drawn cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payee and the bank"

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—proceeds to explain that privity of contract between the check-holder and the bank may take the case out of the general rule, and authorize a suit by such holder against the bank, and he says:

“It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Merch. Bk. v. State Bk.*, 10 Wall [77 U. S.] 604, 19 L. Ed. 1008; *Espy v. Bk.*, 18 Wall. [85 U. S.] 604, 21 L. Ed. 947. It may accomplish the same result by writing upon it the word ‘good,’ or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them. *Cooke v. Bk.*, 52 N. Y. [11 Am. Rep. 667]. And such certificate, it is said, discharges the drawer. As to him it amounts to a payment. *Bk. v. Leach*, 52 N. Y. 350 [11 Am. Rep. 708]; *Meads v. Bk.*, 25 N. Y. 143 [82 Am. Dec. 331]; *Mussey v. Bk.*, 9 Metc. [Mass.] 311; *Willets v. Bk.*, 2 Duer [N. Y.] 121. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee.”

See, also, for full discussion of what circumstances will constitute an equitable assignment of a fund, *Fourth Street Nat. Bank v. Yardley, Receiver*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, and copious note.

When we view what transpired in the bank when the check was drawn on this fund, where all the parties in interest were assembled for the express purpose of providing this fund should be used, in the light of the knowledge possessed by the cashier, we think a privity of relation and contract sufficient to authorize the maintenance of this suit by plaintiff is fully established. The fund consisted of the one item; the ownership and purposes for which it was intended being known to the bank when deposited.

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When the parties met the day following the deposit, the contract relative to the sale of the land had been written. It provided that each of the contracting parties deposit \$1,000 in money, with the contract, to secure its faithful performance. Instead of taking the cash out of the bank and putting it physically in escrow, it was decided to represent it by the check; this was to the decided advantage of the bank, in those panicky times, regardless of who proposed the plan. The realty firm and the plaintiff both inquired of the banker if this check would get the money, meaning of course the identical fund in question; the banker assured both parties it would get the money; then, to reassure them, he took the check already executed, and said he would "fix it." He then wrote in the face of the check "in escroe," which could have been for no other purpose than to convince the parties that the fund represented by that check would be set apart and held for the payment of that check upon the completion of the contract.

Some considerable time is used in an argument that it was illegal to contract for the sale of this land before final proof had been completed, and for that reason the suit against the bank for this deposit must fail. We do not think so. This is not an action on an illegal contract, but is to recover a deposit held by the bank in trust, and which it wrongfully appropriated to its own use and refused to turn over as it had under the course of dealings become bound to do. A lawful agreement between parties will be enforced, even though it may be remotely, incidentally, or indirectly connected with a contract that is illegal and therefore unenforceable, where such lawful agreement is supported by an independent consideration, and which can be proven without the aid of the illegal contract. *City Nat. Bank v. Mitchell et al.*, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371.

It is also asserted that the contract between the plaintiff and the realty company as agent, put in escrow, was illegal because it provided a forfeiture. We think the real purpose of the contract was to secure a faithful and prompt completion of the sale, and that the \$1,000 deposited by the purchaser was certainly intended to be turned over as a payment of the consideration of

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the sale. This is what the parties attempted, and the bank has thus far frustrated. We fail to see wherein it is the business of the bank to censor the contracts of its clients, in which it has no concern, and apply to such contracts a construction that would render them invalid, when the parties themselves have acted upon them, thus construing them, in a way that shows the intention not to be illegal.

2. The point that incompetent evidence was admitted is not well taken. The witness was asked how he came to make the deposit of this particular draft. An objection was made and overruled. We think the circumstances and disclosures made to the bank when making this deposit were competent and material. And while the witness in proceeding in narrative form may have stated some things not strictly competent, no further objections were made, and we do not feel called upon to consider the evidence in detail.

3. The instructions to the jury, taken as a whole, are substantially correct. The theory of defendant was presented, if we mistake not, in the language of its own counsel. And in the light of our holding herein as to the law of the case the instructions were as liberal to defendant as it could have possibly expected. No good service would be rendered in prolonging this opinion with a recital of the instructions given and those refused together with an analysis thereof.

The cause should therefore be affirmed.

By the Court: It is so ordered.

ST. LOUIS & S. F. R. CO. v. SMITH.

No. 2494. Opinion Filed December 23, 1913.

(137 Pac. 714.)

1. **RAILROADS—Action for Killing Cattle—Duty to Fence—Question for Jury.** By statute (section 1389, Comp. Laws 1909, section 1435, Rev. Laws 1910) it is made the duty of railroad companies to fence their roads, except at public highways and station grounds, with a good and lawful fence.
2. **SAME.** Whether a certain place constitutes a part of the station grounds, or a public highway, where the railroad company is by statute exempt from maintaining a fence, is a question of fact for the jury trying the case.
3. **SAME—Killing of Animals—Sufficiency of Evidence.** The fact that the evidence may show that the cattle were killed at a railroad crossing, relatively near a station platform, is not sufficient proof that the killing occurred either at a public highway or a station grounds.
4. **DAMAGES—Killing of Cattle—Evidence of Value—Sufficiency.** The testimony examined and held sufficient to prove the market value of the animals killed and injured.
5. **HIGHWAYS—"Public Highway."** A "public highway," as distinguished from a private road, is one which is open to the travel of the public. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway.

(Syllabus by Sharp, C.)

*Error from County Court, McCurtain County;
T. J. Barnes, Judge.*

Action by T. W. Smith against the St. Louis & San Francisco Railroad Company. From judgment for plaintiff, defendant brings error. Affirmed.

W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiff in error.

Opinion by SHARP, C. From a careful examination of the testimony, we fail to find any evidence of negligence on the part of the train crew in charge of the freight train that struck plain-

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tiff's cows. On the other hand, it conclusively appears that, after the discovery of the animals on the track, it was impossible to stop the train in time to avoid the accident. *Atchison, T. & S. F. Ry. Co. v. Henderson*, 27 Okla. 560, 112 Pac. 986; *St. Louis & S. F. R. Co. v. Webb*, 36 Okla. 235, 128 Pac. 252.

However, in addition to the foregoing allegation of negligence, it was further charged that the railroad company had negligently and knowingly permitted its right of way fence to be down, and not in condition to turn stock, and thereby plaintiff's cows strayed upon the track, with the result that one was killed and another was injured. By the statute it is made the duty of every person or corporation owning or operating any railroad in this state to fence its right of way, except in public highways and station grounds, with a good and lawful fence. Comp. Laws 1909, sec. 1389 (Rev. Laws 1910, sec. 1435). Section 1390 (Rev. Laws 1910, sec. 1436) defines a lawful fence. Section 1392 (Rev. Laws 1910, sec. 1438) provides:

"Whenever any railroad corporation or the lessee, person, company or corporation operating any railroad, shall neglect to build and maintain such fence, as provided in this act, such railroad corporation, lessee, person, company or corporation operating the same shall be liable for all animals killed by reason of the failure to construct such fence."

The question, therefore, for our determination under this issue is: Was the accident committed at a public highway or a station grounds on defendant's line of road? It occurred at the little mill town of Duval, a flag station on defendant company's line of road in McCurtain county. At the station there was no depot, but, instead, a platform (presumably for the use of passengers in getting on or alighting from the trains). The crossing near which the accident occurred was a short distance west of the platform. West of this crossing some twenty or thirty yards, the railroad company had put in cattle guards. It appears that the right of way on either side of the crossing had been fenced, but that the fences had not been kept up, and were down at the time of the accident. At the point of crossing there were gates in the fence, which testimony shows to have been allowed to remain open. After installing the cattle guards, the

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company had put up the right of way fence at the crossing on several occasions. It appears, from plaintiff's testimony, that this crossing, while the only one in that vicinity, was a private crossing to a nearby sawmill. On both sides of the track, were several piles of railroad ties, between the cattle guards and the dirt road crossing to the east. Whether or not the point of crossing was a public highway within the meaning of the statute, or whether the animals were struck at a place constituting the station grounds of defendant company, is not clear, as we shall presently see. A public highway, as distinguished from a private road, is one which is open to the travel of the public. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway. *In re City of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825; *Shelby County Commissioners v. Castetter*, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687; *Lauffer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; *State v. Paine Lbr. Co.*, 84 Wis. 205, 54 N. W. 503; *Southern Kansas Ry. Co. v. Oklahoma City et al.*, 12 Okla. 82, 69 Pac. 1050. It seems that this roadway led through the little town to the south, past plaintiff's residence, but it does not appear from where, or that it was used by the public in general, pursuant to a lawful right, and we are left to infer its character further than as shown by the foregoing testimony.

Whether a certain point constitutes a part of the station grounds or a public highway crossing, where the company is exempt by statute from maintaining a fence, is usually a question of fact to be determined by the jury trying the case. *St. Louis & S. F. R. Co. v. Brown*, 32 Okla. 483, 122 Pac. 136; Elliott on Railroads, sec. 1202. The fact that the crossing was the only one in the village did not necessarily make it a public crossing. There was testimony tending to show that it was a private crossing for the convenience of particular individuals, in which event it would be the duty of the railroad company to exercise reasonable care to see that its fences were kept up, and its gates closed, as was held in *St. Louis & S. F. R. Co. v. Williams*, 31 Okla. 450, 122 Pac. 152. As already noted, the testimony is confusing as

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to the character of the place where the animals were struck, *i. e.*, whether at a place where defendant was required to erect and maintain a fence, or at either a public crossing or station grounds. While the accident occurred relatively near the station platform, and between the platform and certain cattle guards to the westward, yet it was outside of the switches, and at a point where the railroad company had maintained a fence inclosing its right of way; and at the crossing had caused gates to be erected in its fence, but which were down at the time of injury. The testimony was sufficient to give rise either to an inference in favor of plaintiff or one favorable to defendant, and is therefore concluded by the verdict of the jury.

It is urged that there is no competent evidence tending to prove the market value of the cattle struck by defendant company's train. We have read the entire testimony with care, and cannot agree with counsel. It was sufficiently shown that the market value of the cow killed, and the damages sustained to the one injured, exceeded the amount of the verdict. Some of the questions and answers were objectionable. The plaintiff was asked, after having first been qualified: "Q. What was she worth? A. She was worth \$75 to me." This answer is particularly objected to, but it does not appear from the record that any objection to said answer was made at the time. The animal killed, as shown by the testimony, was a first-class Jersey milch cow, fresh and in good order; the animal injured was her half-sister. We think the testimony sufficient, within the rule announced in *Midland Valley R. Co. v. Ezell*, 36 Okla. 517, 129 Pac. 734; *Choctaw, O. & G. R. Co. v. Deperade*, 12 Okla. 367, 71 Pac. 629; *Filson v. Territory*, 11 Okla. 351, 67 Pac. 473; *Coyle v. Baum*, 3 Okla. 695, 41 Pac. 389.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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ST. LOUIS & S. F. R. CO. v. KERNS.

No. 2693. Opinion Filed June 11, 1913.

Rehearing Denied December 23, 1913.

(136 Pac. 169.)

1. **PLEADING—Motions—Judgment on Pleadings.** A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact to be tried.
2. **CARRIERS — "Passenger" — Rights — Contributory Negligence.** Kerns made and entered into a special shipment contract with the railroad company covering transportation of a car of household goods and live stock. As consideration for the feeding, watering, and caring for the live stock, Kerns was given free transportation. The special contract provided, among other things, that Kerns should have the sole care of said live stock and should feed, water and otherwise care for them; that he would remain in the caboose attached to said train, while the train was in motion and would not get on or off any freight car while switching was being done at stations. **Held:**
 - (a) That Kerns was a passenger, the consideration for his passage being the care given the stock.
 - (b) That as such he was entitled to the highest reasonable and practicable skill, care, and diligence from the railroad company.
 - (c) That in the discharge of his imposed duty under the contract he had a right to enter the car at a station, at noon, for the purpose of feeding and caring for the stock.
 - (d) That he, having no control of the movement of the cars, or the train, violated no valid term of said contract by being in said car as aforesaid while the same was being switched.
3. **TRIAL — Instructions — Assuming Facts.** Instruction examined and held to be a correct statement of the law under the facts of the case.
4. **APPEAL AND ERROR—Verdict—Evidence.** Evidence examined, and held sufficient to sustain the verdict.

(Syllabus by Robertson, C.)

Error from District Court, Tillman County;
J. T. Johnson, Judge.

Action by J. K. Kerns against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

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W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiff in error.

Gray & McVay and Hudson & Mounts, for defendant in error.

Opinion by ROBERTSON, C. The plaintiff in his petition charges:

"That on the 27th day of October, 1908, the plaintiff was by the permission, knowledge, and the consent of the defendant, its agents, servants, and employees, in a certain freight car looking after his live stock being shipped by the defendant, said car being upon the track of the defendant at and near the oil mill in the city of Frederick, state of Oklahoma, and while in said freight car at the place aforesaid, and while engaged as aforesaid in taking care of his live stock as aforesaid and without fault and negligence on his part, the defendant, its agents and employees, carelessly and negligently ran an engine into and against said car, knocking plaintiff down upon the floor of said car by said collision and grievously bruising, mangling, and wounding him and which made him sick and sore, injuring him in the following particulars, to wit: Greatly bruising his left side, severely injuring or breaking one rib, greatly injuring the muscles and tendons of his left side, and causing an enlargement of the spleen, thereby permanently injuring the plaintiff, rendering him unable to perform physical labor, and disfiguring him for life. * * * That said collision and the injury thereby inflicted on the plaintiff were caused by the negligence, mismanagement, and want of care of the servants, agents, and employees of said defendant in the negligent management and control of the said engine and said freight car which was being managed and controlled by the defendant, its agents, servants, and employees."

The defendant, on the 11th day of November, 1909, filed its answer to said petition, which sets up, in substance, the following defenses:

"(1) A general denial. (2) That when said shipment of live stock mentioned in plaintiff's petition was received, a contract was entered into by the defendant and one J. A. Davis, the owner of said live stock, which said live-stock contract is marked 'Exhibit A' and made a part of said answer (12). And that in consideration of same, and of the transportation, furnished to plaintiff, plaintiff and defendant entered into a special written

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agreement which was signed by plaintiff, and the duly authorized agent of the defendant, wherein it was provided as follows: "The undersigned, owners in charge of the live stock mentioned in the within contract, in consideration of the free pass granted us by the St. Louis & San Francisco Railroad Company, hereby agree that the St. Louis and San Francisco Railroad Company shall not be liable for any injury or damage of any kind suffered by us while in charge of said stock or on our return passage, and we hereby further agree to observe the following regulations, and do hereby release said railroad company, or those operating the same, from all liability for any injury or damage suffered by us, if injured while violating said regulations: Will remain in the caboose car attached to the train drawing said car while the train is in motion. Will get on and off said caboose car only while same is still. Will not get on, or be on, any freight car while switching is being done at station. Will not walk or stand on any track or station or other place at night without lantern. J. K. Kerns. J. W. Hall, Agent." And defendant alleges that, if plaintiff received the injuries alleged to have been received by him, they were received while said car was being switched in the yards of defendant and in violation of the terms of said contract without any fault on the part of defendant, its agents, servants, or employees. That it was further provided by said contract that no agent of said company has any authority to waive or modify the terms of said agreement."

The plaintiff on March 24, 1910, filed his reply to said answer. The allegations of said reply are substantially as follows:

"(1) A general denial of each and every allegation contained in the answer except such as are specifically admitted. (2) That plaintiff was in said freight car while the same was on the track of the defendant at or near the oil mill near the city of Frederick, and while in said car he was discovered by the defendant, its agents or employees, in time to escape from and avoid the danger of injury had he been notified by them, and that said agents and employees carelessly and negligently, knowing plaintiff to be in said freight car, ran said engine into same, inflicting the injuries set forth in plaintiff's petition, and that said agents and employees of defendant, after discovering plaintiff in said car, failed to give him notice that the engine was to be run against the same."

The cause was tried on March 25, 1910, resulting in a verdict for plaintiff for \$300, and thereafter, on motion of defendant for new trial, said verdict was set aside and a new trial

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granted, and said cause reassigned for trial. And thereafter, on October 11, 1910, said cause again came on for trial, and, before entering upon the same, the defendant moved for judgment on the pleadings, which said motion was overruled and the defendant excepted. The trial resulted in a verdict for the plaintiff in the sum of \$1,500, and the railroad company brings error and assigns, as grounds for reversal: (1) The court erred in overruling defendant's motion for judgment on the pleadings. (2) The court erred in overruling defendant's demurrer to the evidence. (3) The court erred in giving instruction No. 3. (4) The court erred in overruling defendant's motion for a new trial.

In support of the first assignment of error, the railroad company insists that when affirmative matter of defense is set up in the answer, and plaintiff seeks by reply to meet such defense by way of confession and avoidance, the matter alleged in avoidance must be sufficient to overcome the defense set up in the answer. It is urged that by the allegations of plaintiff's reply it is admitted that the injury complained of was occasioned by the violation of the terms of the contract pleaded in defendant's answer, but that a waiver of the conditions of said contract is attempted by the reply of plaintiff; but the company insists that even though the allegations of the reply were true they would not constitute a waiver. The company also insists that by virtue of the terms of the contract it was not its duty, nor the duty of its agents, to inform plaintiff that his presence in the car, while the same was being switched, was attended by danger, for the reason that his signature to the contract was a sufficient warning that such conduct was dangerous. In support of these contentions the railroad company relies upon the doctrine announced in *St. L. & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470, and *St. L. & S. F. R. Co. v. Cake*, 25 Okla. 227, 105 Pac. 322, where it is said:

"It would certainly seem to be the duty of the defendant in error (plaintiff), upon admitting the execution of the contract, to either especially allege compliance with the terms thereof, or to especially plead some of the facts, if any such there were, which might tend to show a substantial compliance with the terms

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of said contract, and which might tend to relieve him from compliance therewith, or he should in some form have alleged a waiver of the terms of said contract on the part of the defendant."

The plaintiff insists that the foregoing reasons and authorities do not apply in this case for that, while it is true that the reply is unverified and the execution of the contract set up in defendant's answer thereby admitted, yet that part only excused defendant from proving the contract, but did not in any wise take away the right of plaintiff to establish the truthfulness of the allegations of his reply. The execution of the contract is admitted by the plaintiff, but by such admission plaintiff does not admit the truthfulness of the allegations of the answer, or that the mere execution of the contract, with its stipulations and conditions, precludes him from showing that the said conditions had been waived, or were otherwise inoperative on him; on the contrary, plaintiff by his reply set up a state of facts which, if found to be true by the jury, according to his theory, will entitle him to recover notwithstanding the terms and conditions of the contract. We are inclined to disagree with counsel for the railroad company in their position on this question. We do not think the cases cited, *supra*, are at all applicable. In both of those cases the reply of the plaintiff was an unverified general denial; no facts were pleaded in addition to the general denial that could in any manner be construed as constituting a defense to the new matter set up in defendant's answer, and, inasmuch as the general denial amounted only to a legal conclusion, it follows, of course, that it was insufficient in law to entitle the plaintiff to recover. But in the case at bar we have a wholly different condition confronting us. The reply, in addition to the general denial, charges the existence of certain facts, which, if true, would relieve plaintiff from the effects of the literal terms and conditions of said contract, in so far as said contract is relied upon to relieve the company from the results of its negligence in connection with the accident complained of. Thus, in said reply, it is alleged:

"That plaintiff was in said freight car while the same was on the track of the defendant at or near the oil mill near the

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city of Frederick, and while in said car *he was discovered by the defendant*, its agents or employees, in time to escape from and avoid the danger of injury had he been notified by them, and that said agents and employees carelessly and negligently, knowing plaintiff to be in said freight car, ran said engine into same, inflicting the injuries set forth in plaintiff's petition, and that said agents and employees of defendant, after discovering plaintiff in said car, failed to give him notice that the engine was to be run against the same."

Section 1 of the special contract pleaded by defendant contains the following provision:

"That he will load, unload, and when necessary reload said stock *and feed, water and attend to the same* at his own risk and expense, while the same are in the cars of the company or any connecting line or lines, or while in any stockyards of the company or any connecting line," etc.

While section 12 thereof provides that, "in consideration of free transportation for person or persons to accompany the live stock, * * * it is agreed that the said car and said live stock contained therein, are, and shall be in the sole charge of such person or persons for the purpose of attention to and care of said live stock," etc.

The evidence shows that there were four head of horses in the car; that Mr. Kerns, when the train stopped at Frederick, at noon, left the caboose and went to and entered the car for the purpose of feeding the horses; that such trip was necessary and that it was his specific duty to care for the stock; that while thus engaged one of the brakemen came along and told him to look out as the engine was coming; that thereupon he took hold of the door of the car to brace or support himself when the engine struck the car with such force as to throw not only himself, but the horses, to the floor, knocking them down, and breaking the partitions down, and shaking things up generally and giving to plaintiff the injuries complained of.

From a consideration of the foregoing it is clearly apparent that the court did not commit error in denying the company's motion for judgment on the pleadings. A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact to be tried. *Noland v. Owens*, 13 Okla. 408,

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74 Pac. 954. That there were issues of fact raised by the reply none will deny, and that these facts, if true, would entitle plaintiff to prevail, is likewise true. To be sure, the special contract provides that plaintiff "will not get on or be on any freight car while switching is being done at station"; but this contract, like all others, must be construed as a whole, and the same must be so construed as to render the same consistent and reasonable, in order to carry out the intention of the parties.

If the contract required plaintiff to feed and care for the live stock and imposed on him the *sole* care, which it does, then it was certainly in contemplation of the parties that he should enter the car, and it is a matter of common knowledge that he could enter the car for this purpose only when the train made stops at stations. Plaintiff did not have charge of the movement of the train at any place, and if, in the discharge of an imposed duty, he was in the car caring for the horses and the train crew, in the discharge of their duties, found it necessary to move this particular car in switching, it certainly cannot be said that plaintiff violated any of the provisions of his contract. It is quite clear that the horses had to be fed and cared for, and it is equally clear that the train would not be held at any place for this particular purpose; hence it follows that in order to perform a rightful duty the plaintiff had a right to be in the car at the time and place of the accident complained of. The special contract provided that he should ride in the caboose while the train was in motion, and that he should get off and on said caboose only while the same was standing still. These provisions emphasized the foregoing contention that from the very nature of the duty imposed by the contract the plaintiff was compelled to enter the car, if at all, when the train was standing still at the station, and, he having no control of the car, ought not to be held culpable if the train crew, without his knowledge or consent, took the car and placed it on the switching track where the accident occurred.

It is hinted, also, that plaintiff assumed all the risk of injury on account of the free transportation guaranteed him by this special contract. This is not true. He did, perhaps, assume cer-

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tain risks, but he did not assume the risks consequent on the gross negligence of the company. If that be the contention of the defendant, it is only necessary to say that such a contract would be void and unenforceable. The company furnished plaintiff free transportation for a consideration. This consideration was that he should feed, water, and care for the live stock. Had plaintiff not done this, the duty would have been imposed by law upon the carrier, and this service, on the part of the plaintiff, was the consideration for the free transportation and was as good and sufficient as though he had paid the regular passenger fare.

And it is also contended that plaintiff did not occupy the relation of passenger to the defendant company. This contention is also erroneous. In *Railroad Co. v. Beaver*, 41 Ind. 493, it was held that a person who is traveling with the consent of the railroad company on a freight train in charge of stock, or goods carried by the company for him, is a passenger. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, it is held that, when such a person is traveling in charge of cattle on a drover's pass, he is a passenger for hire. The consideration for his passage is the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping cattle. See, also, *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railway v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Railway Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809. Therefore, if the plaintiff was a passenger, which, under the foregoing authorities he certainly was, it was incumbent upon the defendant company to exercise toward him the highest reasonable and practicable skill, care, and diligence. Under the facts of this case, it was apparent that no such care and diligence was used.

Counsel for the railroad company contend in their brief that nowhere in the record is it stated, or shown, that the engine struck the car with any *unusual* violence, and pretends to say that the plaintiff does not charge or say that the violence was out of the ordinary, and cite as supporting their contention the case of *St. Louis & S. F. R. Co. v. Gosnell*, 23 Okla. 588, 101 Pac. 1126. 22 L. R. A. (N. S.) 892; but a reading of that case shows the

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facts to be so different as to render it worthless as an authority herein. In the Gosnell case, the plaintiff was a passenger for hire on a freight train and took a seat in the caboose; just before reaching a station the engine stopped at a water tank about 150 yards from the depot when plaintiff, thinking it had reached the station, stepped out on the rear platform to talk to a friend seated on the car steps; learning that the train had not reached the station, the plaintiff, when the train started again, stepped back into the caboose on the way to his seat, and was standing with his hands against the casings of the rear door, when the train suddenly stopped at the depot with such a jar that he was knocked off his feet and injured. It was held in that case that from these facts no inference of negligence on the part of the company could be legitimately drawn, that a motion to direct a verdict for defendant should have been sustained. This undoubtedly states a correct rule of law; but we submit that, under the facts of this case, it is wholly inapplicable, and therefore not controlling as an authority. In this case the plaintiff was not injured by a mere jerk while in a place where he ought not to have been, but the evidence shows that the accident was occasioned by the gross negligence of the defendant in the operation of its engine.

Counsel for the railroad company in their brief insist that "nowhere in the record is it stated that the engine struck the car with any *unusual* violence" (page 21). We do not know whether the force used in this particular instance is or is not unusual with the Frisco. The undisputed evidence shows that a brakeman passing by the car immediately prior to the accident called to plaintiff to "be careful, the engine is coming," whereupon plaintiff took hold of the door to protect himself; that just after the warning the engine struck the car with sufficient violence to not only knock plaintiff down, but also all four horses, besides breaking down the partitions that were nailed to the sides and bottom of the car to keep the horses in one end and away from the household goods. This may be the usual and ordinary method of handling cars on defendant's lines, but the jury evidently did not believe it to be the reasonable way, nor are we very

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much impressed with counsel's contention in this respect. The evidence above referred to is nowhere in the record denied, and it occurs to us that such statements in the brief as the one above alluded to are not supposed to be seriously considered.

It is next contended that the allegations of plaintiff's reply are not sustained by the evidence. It is unnecessary to enter into a detailed discussion of this alleged error. The evidence shows that the train crew knew about the horses in the car, and knew that plaintiff was in charge of the car, and knew that he had been in the car prior to the time of the accident, and the undisputed evidence shows that plaintiff, shortly prior to the time the engine struck the car, was warned by the brakeman to "be careful, the engine is coming." Saying nothing about the duty of the defendant concerning the manner of handling the car under the contract, it is apparent that there was some evidence in the record reasonably tending to support the verdict on this particular point. So, too, as to the other allegations of plaintiff's reply. Such being the case, it is unnecessary to give further consideration to this alleged error. *City of Wynnewood v. Cox*, 31 Okla. 563, 122 Pac. 528.

Complaint is also made on account of giving instruction No. 3, which reads as follows:

"You are instructed that it is the duty of the defendant to operate its trains in such manner as to avoid injury to persons rightfully using the same, and if you find from the evidence that defendant, in making the coupling between its engine and the car in which this plaintiff was caring for his stock on the occasion in question did so in a needlessly violent and careless manner, and this plaintiff was injured thereby, then you will find for plaintiff and assess his damages at such sum as you may think him entitled, not to exceed \$1,950."

It is urged that this instruction does not correctly state the law applicable to the facts in this case, inasmuch as it assumes that plaintiff was "rightfully using" the car at the time of the injury, when as a matter of fact he was using it in open violation of the terms of his contract, and for the further reason that it permits the jury to find that the coupling was made in a needlessly violent and careless manner, when as a matter of fact

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there is no evidence to support such finding. Neither contention is sound. As has been seen heretofore, plaintiff was rightfully in the car at the time of the accident, and the jury properly found that the accident was occasioned by the needlessly violent and careless manner in which the engine struck the car. There was no error in the giving of this instruction.

For the reasons hereinabove given it also necessarily follows that defendant's demurrer to the evidence and its motion for a new trial were properly overruled.

From a careful consideration of the entire record, we fail to discover any error of sufficient magnitude to warrant an interference, and therefore the judgment of the district court of Tillman county should, in all things, be affirmed.

By the Court: It is so ordered.

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No. 2696. Opinion Filed December 23, 1913.

(137 Pac. 1156.)

1. **PLEADING—Amendment—Discretion—Death of Railroad Employee.** Where allowance of filing of amended petition immediately before trial and of insertion of additional allegation amending feature in description of accident resulting in death for which damages are claimed to conform to facts proved do not change substantially plaintiff's claim, and it does not appear any right of defendant was thereby prejudiced, it was in the sound discretion of the court to permit same.
2. **CONTINUANCE—Grounds—Surprise—Discretion.** Where attorney for plaintiff, in questioning jurors as to causes for challenge, makes statement erroneously construed as disclosing ground for removal of case to federal court in conflict with allegation in petition, whereupon attorney for defendant claims surprise, asks leave to withdraw announcement of ready for trial and answer on file and for continuance of case for purpose of time in which to file petition and bond for such removal, whereupon attorney for plaintiff disclaims intent to state and expressly denies existence of such ground, and the undisputed evidence showed that no such ground existed, there was no error in denying such leave and continuance.

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3. **TRIAL—Reopening Case—Discretion.** Where, after both parties have rested, plaintiff is permitted, over oral objection and statement by defendant that she had already announced that her case was closed (which record does not show), that defendant's witnesses have been excused and have left town (which is denied by plaintiff and not supported by affidavit or other proof), and that amendment allowed did not conform to the proof already introduced (which is not entirely correct), to introduce evidence relating to whether space in which her decedent's foot was caught should have been blocked by defendant, and where no prejudice of right or abuse of discretion in doing so appears, there is not reversible error.
4. **APPEAL AND ERROR—Harmless Error—Evidence—Diagram.** The unnecessary permitting of diagram on floor in view of jury and its use, by reference thereto, in questions to and answers by witnesses, is, at least, not to be commended; but, where only few questions and answers relate thereto, and the court then expresses disapproval, to which deference is shown by desisting from such references, and the party objecting thereafter causes witness to make and puts into record a diagram like the one on the floor, and also later puts into record a more elaborate diagram including the same features as the one on the floor, the error will not require reversal of the case.
5. **NEGLIGENCE—Contributory Negligence—Question for Jury.** Const. art. 23, sec. 6 (section 355, Williams' Ann. Const.), of Oklahoma, is not merely declaratory of the common law, but requires that the defense of contributory negligence and of assumption of risk, as questions of fact, in all cases whatsoever, shall, at all times, be left to the jury; and the finding of the jury upon these defenses is conclusive upon the courts.
6. **TRIAL—Contributory Negligence—Refusal of Instructions.** It is not error to refuse requested instructions going beyond bare definition, as to the defenses of contributory negligence or assumption of risk, though they correctly state the law in other respects, if the jury are not instructed and the party presenting same does not request instruction to effect that "the defense of contributory negligence or of assumption of risk, in all cases whatsoever, shall be a question of fact, and shall, at all times, be left to the jury."
7. **SAME—Refusal of Instructions Covered—Negligence—"Ordinary Care"—"Ordinary Negligence"—"Contributory Negligence."** Where the court defines "ordinary care" as "such care as a person of ordinary prudence would exercise about his own affairs of ordinary importance" and the want of same as "ordinary negligence," and further instructs that "contributory negligence, as used in these instructions, is such an act or omission on the part of plaintiff's decedent which amounts to a want of ordinary care on his part and which, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the act complained of," it is not reversible error for the court to refuse to give a differently worded instruction substantially to the same effect, nor another that merely emphasizes and illustrates the rule given the jury.

Syllabus.

8. **SAME—Injury to Railroad Employee—Refusal of Instruction—Evidence.** Where uncontradicted evidence shows safety would result from blocking dangerous open space between guard rail and main line rail in yard of railroad company used in switching cars at night, and that, besides defendant, which did not, two of three other roads for which the only witness on this point had worked used the blocking system, which it does not appear introduces any new danger, it was not error to refuse to instruct "that the mere fact that defendant did not block the frogs, guard rails, and angles between the side track and the rail of its main track will not warrant you in finding that the defendant was negligent, and such omission on the part of the defendant does not amount to negligence as a matter of law."
9. **DEATH—Damages Recoverable.** Where plaintiff wife was nearly 24 years old, the child for whom she also sued was two years old, and her decedent husband was 30 years old, sober and healthy, and where decedent had earned as high as \$160 per month while working for another railroad company, and, within the 20 or 21 months during which he worked for defendant, had commenced work at \$50 and thereafter got \$120 per month until about fifteen days before his death, but during these days worked about an hour less time each day and got a little less salary, and where he was affectionate to his family and usually turned his earnings over to plaintiff, who paid bills and deposited balance in bank, and he did not spend money foolishly, although only about \$200 was in bank at time of his death and plaintiff's account of his use of his earnings is not entirely satisfactory, it cannot be said a verdict for \$15,000 damages by reason of his death from negligence of defendant is excessive and apparently given because of passion or prejudice.
10. **MASTER AND SERVANT—"Assumption of Risk."** "Assumption of risk" is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk.

(Syllabus by Thacker, C.)

Error from District Court, Marshall County;
James R. Armstrong, Judge.

Action by Mabel V. Long against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, for plaintiff in error.

Wolfe, Wood & Haven and Hardy & Franklin, for defendant in error.

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Opinion by THACKER, C. In this opinion plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On March 15, 1909, S. H. Long, foreman of defendant's switch engine crew, was killed in uncoupling its moving cars in its yards at Francis, Okla.; and on June 10, 1909, plaintiff, for herself and minor child, Hazel Long, these being wife and child respectively of said S. H. Long, commenced this action against defendant for \$35,000 as alleged damages suffered by reason of alleged negligence of defendant, as master, causing the death of the husband and father, as its servant.

The defendant assigns error in that the court permitted plaintiff (first specification) "to file an amended petition after the case had been called for trial" (seventh specification) "to reopen her case after she had announced that she rested," and (eighth specification) "to amend her petition after both the plaintiff in error and defendant in error had rested and after the court had excused the witnesses."

On the same day, but apparently before the case was called for trial, plaintiff was permitted to file, over objection in most general terms, an amended petition alleging negligence in the failure and refusal of the engineer in charge of the switch engine to slow up and stop in obedience to a signal given by plaintiff's decedent before he went between the cars, in anticipation that such signal would be obeyed, to make the uncoupling, and in thereafter starting "said cars backward at a very dangerous rate of speed," which allegations in respect to signal finds no support in the evidence, unless such an inference could have been drawn by the jury from the proven facts admissible under the original as well as the amended petition, which, without necessity for deciding, we may assume for the purpose of this opinion could not have been done; and, although the two other grounds of negligence charged in the original petition were repeated in somewhat changed form in this amended petition, it does not appear that any other material change in the original petition was made by this amendment. Plaintiff's original petition, as well as this amended petition, alleges negligence against the defend-

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ant in that it had permitted the frogs and angles of its rails to remain open without blocks, and had permitted the defective condition of the coupling equipment in the car her decedent was attempting to uncouple at the time of the accident; and that from these causes "his foot caught in a frog in the track, or in an angle formed by the side track rail approaching the rail of the main line, and was thrown down and run over by said cars and cruelly killed." After this amended petition was filed, defendant refiled its amended answer, plaintiff filed her reply, and the case went to trial with both parties apparently ready.

After a demurrer to the evidence introduced by plaintiff had been overruled, she asked and was granted permission to withdraw her announcement of rest, defendant thereupon excepted, plaintiff thereupon stated a desire to prove that other railroads in the vicinity of the accident protected users of their yards by blocking frogs as the purpose for which she desired to withdraw such announcement, the defendant then objected, and the court then repeated the permission already given; but the plaintiff thereupon announced: "Well, we will stand on the record as it is."

After both parties had rested in the taking of evidence, plaintiff asked and was permitted to reopen the case and amend her petition to conform to the proof by inserting the following additional words: "That deceased caught his foot between the guard rail and the main line and was thereby run over and killed."

It does not appear wherein the allegation of negligence in the conduct of the engineer in charge of the switch engine in disregarding any signal found defendant unprepared to meet it, even if there had been evidence in support of that allegation, nor wherein the defendant might have been better prepared at any future time, nor wherein the allowance of the amendment made any occasion for the imposition of any onerous term as a condition thereof, nor wherein the amendment by insertion of the words last above quoted is subject to any objection urged against it by defendant; the objection being in general and not specific terms, and the trial being free from any developments showing any wrong done defendant in this regard. Neither of

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the amendments changed substantially the claim of the plaintiff, it does not appear that they operated to the prejudice of the rights of the defendant, and it was in the sound discretion of the trial court to permit each of them.

We are unable to find any reversible error in the action of the trial court complained of in either or all of the three assignments of error above mentioned. Comp. Laws 1909, sec. 5676 (Rev. Laws 1910, sec. 4790); *City of Shawnee et al. v. Slankard*, 29 Okla. 133, 116 Pac. 803; *Herron v. M. Rumley*, 29 Okla. 317, 116 Pac. 952; *Z. G. Fort Produce Co. v. Southwestern Grain & Produce Co.*, 26 Okla. 13, 108 Pac. 386; *Lookabaugh v. Bowmaker*, 21 Okla. 489, 96 Pac. 651; Comp. Laws 1909, secs. 5673, 5674 and 5675 (Rev. Laws 1910, secs. 4784-4786); *Binion v. Lyle*, 28 Okla. 430, 114 Pac. 618; *St. L., I. M. & S. Ry. v. Hardwick et al.*, 28 Okla. 577, 115 Pac. 471; *Chas. T. Derr Const. Co. v. Gelruth*, 29 Okla. 538, 120 Pac. 253; *Coley v. Johnson*, 32 Okla. 102, 121 Pac. 271; *Merchants' & Planters' Ins. Co. v. Crane*, 36 Okla. 160, 128 Pac. 260; *Gross Const. Co. v. Hales*, 37 Okla. 131, 129 Pac. 28; *Booker Tobacco Co. v. Waller*, 38 Okla. 47, 131 Pac. 537.

The defendant further assigns error in that the court refused (specification 2) "to grant the defendant a continuance and" leave "to withdraw its amended answer, which had been filed under a misapprehension of facts, and for the further reason that counsel had overlooked new issues that had been raised in defendant in error's amended petition which plaintiff in error was not prepared to meet."

It does not appear that any new issue other than above stated was raised by any amendment of plaintiff's petition; and this assignment of error appears to be entirely without merit, inasmuch as no "misapprehension of facts" of which defendant could complain is specified in the briefs or appears in the record; it does not appear wherein defendant was surprised or unprepared, or how it might by a continuance have been better prepared to meet any new issue raised; nor is there any specification of new issue overlooked or sufficient explanation given throwing any light upon why counsel overlooked the same. It appears that request

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for leave to withdraw the answer from the files was merely an incident of defendant's request for a continuance, and had for its purpose the same purpose for which the continuance was asked, *i. e.*, to give defendant time to prepare and file a petition and bond for removal of the case to the proper federal court, and this assignment of error appears to relate to no other purpose whatever; but the record does not disclose any fact justifying such purpose. No further ground for such removal appears, although, in the examination of the jurors as to their qualifications, counsel for the plaintiff stated that she "is at the present time at Stringtown, Okla.;" and thereupon defendant's counsel asked leave to withdraw its announcement of ready for trial on the ground that the pleadings (evidently referring to said amended petition) and statement (evidently referring to the statement just quoted) of counsel for the plaintiff had taken counsel for defendant by surprise, in that it appeared to him in the light of that statement that plaintiff was at that time a resident of Oklahoma, which, if true, might have afforded ground for such removal. On this ground, and for the purpose of filing a petition and bond for removal from the state to the federal court, counsel for the defendant asked a continuance of the case. Counsel for the plaintiff (erroneously, as it appears, assuming he had stated she was a resident of Oklahoma) thereupon stated that his statement that plaintiff resided at Stringtown, Okla., was inadvertent; that he did not intend to change her place of residence; and that he meant to state she was visiting her brother at Stringtown, and that he withdrew his former statement. The court stated that, if it should develop that plaintiff was a resident of Oklahoma, the verdict should be set aside. Thereupon defendant added to its motion by asking leave to withdraw its amended answer for the reason that the same was filed under the misapprehension that plaintiff was a resident of the state of Texas. Whereupon the court stated that if it should develop on the trial that plaintiff was really a resident of Oklahoma, defendant should have the right to file a petition for removal; but that, as counsel for plaintiff had declared his remark in this regard was inadvertent, and that he only intended to state she

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was visiting in Oklahoma, and there was no evidence before the court as to her residence, defendant's motion would at that time be denied, to which defendant excepted. The uncontradicted evidence of the plaintiff was that she resided (as alleged in both original and amended petitions) in the state of Texas and owned her home at Denison, Tex., and had so resided all her life, except from about February 17, 1908, until some time in March, 1909, during which excepted time she lived at Francis, Okla.; and the request for continuance was not renewed.

"The granting or refusing of a continuance is within the sound judicial discretion of the trial court; and, unless it appears that there was an abuse of such discretion, the order of the trial court in such matters will not be disturbed by the Supreme Court on appeal." (*Kelley et al. v. Wood*, 32 Okla. 104, 120 Pac. 1110, and cases there cited.)

"Surprise at the trial is not sufficient ground for a continuance, unless the surprise is such as cannot be obviated by the exercise of ordinary care and due diligence on the part of the party asking for the continuance." (*M., K. & T. Ry. Co. v. Horton*, 28 Okla. 815, 119 Pac. 233.)

Defendant further assigns error in that the court permitted plaintiff (ninth specification) "to reopen her case and introduce further evidence after same had been closed and after the court had excused the witnesses." Plaintiff asked and was granted leave to reopen the case for the purpose of "offering additional proof" in connection with her last aforesaid application to amend her petition after both parties had rested; and defendant objected to the same as follows:

"To which application of the plaintiff defendant objects for the reason that the plaintiff has already announced that her case was closed and some of the defendant's witnesses have been excused and have left town, and for the further reason that said amendment does not conform to the proof already introduced, and the purpose of the same is to introduce new evidence changing the issues and making the issues other than that raised by the original pleading."

But it does not appear that plaintiff consented nor who excused these witnesses. Plaintiff stated in answer to this objection that no train or witness had left and no witness had any way

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to leave, to which defendant did not reply; and no proof was offered upon the issue thus made by statement of counsel. The amendment of the petition was made, as hereinbefore stated, and immediately after this plaintiff recalled the witness Martin J. De Long, and, without further objection, introduced additional testimony relating to the blocking of frogs and angles by railroad companies. The case of *Harris v. Palmer*, 25 Okla. 770, 108 Pac. 385, is in point here. In the opinion in that case the case of *West v. Cameron*, 39 Kan. 736, 18 Pac. 894, is quoted with apparent approval as follows:

"In the case of *West v. Cameron*, *supra*, the Supreme Court of Kansas on this proposition said: 'The opening of a case for the purpose of receiving further evidence, after the case has been tried, but before any decision has been rendered therein, and the continuance of the case for such evidence, and the receiving of the same are all within the judicial discretion of the court. * * *'"

In the state of the record above disclosed it does not appear that there was either prejudice or abuse of discretion in the action of the court in permitting the reopening of the case and the introduction of this additional testimony without objection other than above stated.

The defendant further assigns error in that the court permitted (tenth specification) "incompetent, irrelevant, and immaterial testimony offered by defendant in error and objected to by plaintiff in error," and excluded (eleventh specification) "competent and relevant testimony offered by plaintiff in error"; but the brief does not point out what testimony offered by defendant was excluded.

It is contended that the court erred in permitting the witness De Long, over objection and exception by the defendant, to draw a diagram on the floor, from which he afterwards, without objection at the time, testified by designating thereon the "station," the "shanty," where plaintiff's decedent was killed, and the guard rail, between which and the main line rail he had been mashed by the wheels of the train. After answer to the fourth question referring to the plat on the floor, the defendant moved to strike this testimony out as incompetent, irrelevant, and im-

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material, "the witness having made indications on the floor, that cannot be shown in the record," to which the court made no immediate response; but counsel for plaintiff responded by stating to the stenographer that: "The point indicated by the witness * * * is the point where the side track that runs on the west side of the main line joins the main line on the east rail of the main line;" to which statement defendant objected; and in response to this objection the court said: "Yes, let the witness state that, I think it would be better;" whereupon counsel for defendant stated: "That is the objection I have to the whole proposition on the floor—it don't go into the record; reference of the witness to the different points on the diagram on the floor will be unintelligible on the record;" to which the court responded: "It will unless he is careful." The record does not disclose any exception taken by defendant to either the action or inaction of the court relating to this matter except to the drawing of the diagram on the floor in the first instance, as above stated.

After a few further questions, without reference to the diagram that had been drawn on the floor, counsel for plaintiff said:

"I don't know whether the jury understand or not; the gentleman objects to my using the diagram; the main thing is to let the jury understand (here the attorney draws diagram on the floor)—now, say the straight line there indicates the one side of the angle and this curve indicates the other side of the angle that joins the main line; you say the block is driven in the angle; if I understand you, you drive the block in so as to close up this acute angle or sharp angle where this man's foot was caught, and at the end of the block the rails flare apart so as to give no chance for the man to catch his foot?"

Objection was made to this interrogative statement as follows:

"Objected to as leading and suggestive, and for the further reason that the diagram has been drawn on the floor, which cannot be incorporated in the record, to which the witness' attention has been called."

The court overruled this objection; and thereupon counsel for plaintiff asked the witness, who had not answered the question: "Can you answer that, the effect of putting the block in the angle?" Before this question was answered, the court said:

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"I don't see why you can't ask the question and make it clearly intelligible to the jury without referring to the diagram;" to which counsel for plaintiff responded by saying he would try to do so; and it does not appear that there was any further reference by him to the diagram on the floor. Later defendant called upon this same witness to make and, when made, put into the record a diagram purporting to be identical with the one drawn upon the floor; and, in addition to this, later put into the record a more elaborate diagram embracing, among others, all the features of the one purporting to be identical with the one drawn on the floor. The record does not disclose that there was any difference between the diagram drawn upon the floor in respect to what it represented and those that were put into the record; but, to the contrary, all the diagrams appear identical with respect to the features shown by the one drawn on the floor.

The court should not perhaps have permitted the unnecessary drawing of the diagrams upon the floor, which could not conveniently be made part of the record, nor the testimony of the witness, nor the statement of counsel with reference to the same over the objection by defendant—at least, it is a practice not to be commended. See *Rachmel v. Clark*, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 959; *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179. But it does not necessarily follow that this was reversible error. In *Meek v. Daugherty*, 21 Okla. 859, 97 Pac. 557, it is held: "The admission of incompetent and immaterial evidence, that appears to have prejudiced the substantial rights of the party objecting to the admission thereof, is reversible error;" but can it be said that the drawing of the diagram upon the floor and the testimony and statements relating to the same appear to have prejudiced any substantial rights of the defendant? We think not.

Defendant further assigns error in that the court (fourteenth specification) refused "to give to the jury instructions requested by the defendant," and refused "to give each said instructions numbered from 1 to 17, both inclusive," and (fifteenth specification) gave "the jury instructions numbered 1 to 15, both inclusive," and gave "to the jury each of said instructions over the ob-

jection of the plaintiff in error"; but urge error in brief only the refusal to give special instructions numbered 1, 4, 5, 6, 7, 12, 16, and 17 requested by defendant; and the giving of the court's instructions numbered 2, 9, and 10 only are urged by counsel as error.

Each and all of the instructions refused and given in which defendant contends there was reversible error, except the first and sixteenth instructions refused, relate to the defenses of contributory negligence or of assumption of risk.

The answer of defendant consisted of a general denial, allegations of contributory negligence by plaintiff's decedent, and the allegations of assumption of risk by him.

The court instructed the jury on the issue of contributory negligence as follows:

"(1) Ordinary care, as used in these instructions, is such care as a person of ordinary prudence would exercise about his own affairs of ordinary importance. The want of ordinary care constitutes ordinary negligence.

"(2) Contributory negligence, as used in these instructions, is such an act or omission on the part of plaintiff's decedent which amounts to a want of ordinary care on his part, and which, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the injury complained of.

"(3) You are further instructed that, if you find from the evidence in this case that the plaintiff's decedent was guilty of contributory negligence, then the plaintiff herein cannot recover, regardless of whether defendant was guilty or not. By contributory negligence, as already explained, is meant want of ordinary care on the part of the deceased which in some degree directly caused his injury, and without which the injury would not have occurred. While it was the defendant's duty to provide a reasonably safe place for the deceased to work, and reasonably safe tools and appliances with which to perform his work, and maintain same in such condition, it was also the duty of the deceased, while engaged in the work assigned to him, to exercise ordinary care for his own safety; that is, such care as a reasonably prudent person of his experience and understanding would exercise under the same circumstances and conditions. If you find from the evidence that he did not exercise such care, and was injured by reason thereof, plaintiff cannot recover herein, and your verdict should be for the defendant.

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"(4) In determining whether or not plaintiff's decedent was guilty of contributory negligence in causing his injury, you should take into consideration all the facts and circumstances surrounding him at the time he was injured, as well as his own conduct at and just prior to the accident, his age, his intelligence and understanding, the length of time he had been working in and about the defendant's yards at Francis, his previous experience in the railroad business, and, from all the circumstances and facts surrounding the deceased at the time of his injury which have been introduced in evidence before you, say in your judgment whether or not he was guilty of contributory negligence, and, if, in your opinion, he was not, then the plaintiff herein is entitled to recover; if, on the other hand, you believe that his own conduct and his own acts in some manner and in some degree contributed to his injury, then plaintiff would not be entitled to recover, and your verdict should be for the defendant."

On the issue of assumption of risk the court instructed the jury as follows:

"(5) The said S. H. Long, when he entered the service of the defendant, assumed such risks as were ordinarily incident to the work in which he was engaged, but he did not assume any risk which might be caused by the negligence of the defendant; if, therefore, you believe that the accident which caused the death of the said Long was an accident which could not reasonably have been anticipated or foreseen and thus guarded against by the exercise of ordinary care by the defendant, and was not the result of ordinary negligence on the part of the defendant, its agents or employees, then, in that event, the injury would be one of the risks which the said Long assumed, and in such case it would be your duty to find for the defendant. If, however, you find that the death of the said S. H. Long was occasioned by the failure of the defendant company to exercise ordinary care to handle its cars, to exercise ordinary care for the safety of those working in the yards, then, in such case, the said Long would not be held to have assumed the risk, and, if the said Long was in his proper place of duty and was not guilty of contributory negligence as hereinbefore explained, it would be your duty to find for the plaintiff."

"(9) If you believe from the evidence that the said angle where the said S. H. Long got his foot caught and was run over was unblocked, but that the same was known to the said S. H. Long, and that the dangers arising therefrom were so open and apparent that a person of ordinary prudence would not continue

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to work without the same being blocked, then you will find that S. H. Long assumed the risk of danger arising from the unblocked condition of said angle, and in that event you will find for the defendant.

"(10) If you believe from the evidence that the coupling apparatus of the car above referred to was defective, and if you believe from the evidence that the said S. H. Long knew of the same, or by the use of ordinary care in the performance of his duties could have known of the same, before he undertook to operate it, and you further believe that a person of ordinary prudence after becoming acquainted with the said defects would not have undertaken to uncouple the cars in the manner that S. H. Long did, then you are instructed that the said S. H. Long assumed the risk of being injured by uncoupling the same in the manner he did, and, if you so believe, you will find for the defendant."

"(11) You are further instructed that as to such dangers as are patent and obvious to a person of ordinary intelligence and experience and that are known to the employee, or that ought to have been known to him in the exercise of ordinary care, the master is under no obligation to warn him against them."

Section 6, art. 23 (section 355, Williams' Ann. Ed.), Constitution of Oklahoma reads:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times, be left to the jury."

That these defenses in all cases are questions of fact and must be left to the jury, see, also, the following cases: *Chicago, R. I. & P. Ry. v. Beatty*, 27 Okla. 844, 116 Pac. 171; *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 384, 120 Pac. 969; *Phoenix Printing Co. v. Durham*, 32 Okla. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191; *Chicago, R. I. & P. Ry. Co. v. Hill*, 36 Okla. 540, 129 Pac. 13, 43 L. R. A. (N. S.) 622; *Dewey Portland Cement Co. v. Blunt*, 38 Okla. 182, 132 Pac. 659.

Neither the defense of contributory negligence nor the defense of assumption of risk can arise, of course, unless the defendant has been guilty of negligence which, but for one or both of these defenses, would render it liable for damages to the plaintiff. Until then there is nothing against which to make defense; but, if there be evidence from which the jury may find

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the defendant guilty of such negligence, these defenses, if they exist in fact, are available to the defendant. The section of the Constitution just quoted expressly recognizes these defenses as they existed, especially in their aspects as questions of fact, at the time of the adoption of the Constitution, although we express no opinion as to whether statutory change could be made; but it is quite clear from the language used that neither of them nor any question found in the evidence or want of evidence on an issue made by pleading either or both of these defenses can arise in any case as a question of law for the judge. The judge no doubt should, in leaving these defenses to them, inform the jury what these defenses are, that is, should define contributory negligence and assumption of risk in relation to the evidence and where the burden of proof lies in proper instructions, and inform them of the legal effect of same. The jury no doubt should, as a matter of fact, infer contributory negligence and assumption of risk or the absence thereof where the courts of this jurisdiction, as a matter of law, were accustomed to infer or presume the same prior to the adoption of this section; and it may be that the judge should advise the jury of such inferences and presumptions; but the jury alone can, with binding effect, say what inferences and presumptions of fact may be indulged in determining these defenses. The language of this section and the cases hereinbefore cited do not permit any other interpretation or construction; and there is nothing in the history of the provision under consideration to suggest any other intent on the part of the convention that framed or the people who adopted the Constitution.

It is urged by counsel for defendant in brief and oral argument that this provision of our Constitution is merely declaratory of the pre-existing law; but this contention is conclusively answered by the cases hereinbefore cited, and especially that of *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 384, 120 Pac. 969, in which it is said:

“Another point is made that the proposition that our constitutional provision, providing that the defense of contributory negligence or assumption of risk is a question of fact to be sub-

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mitted to the jury, is merely declaratory of the common law that, when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence whether negligence or contributory negligence exists. Citing *Kiley v. C., M. & St. P. Ry. Co.*, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. To give the Wisconsin provision the construction contended for by the plaintiff in that case would have the effect of conferring judicial power on juries, in violation of article 7, sec. 2, of the Constitution of Wisconsin, which confers all judicial power upon designated courts. In the case at bar the provision under discussion is a constitutional provision, and, of course, it is not necessary to resort to construction to harmonize it with any other enactment. Upon its face, it seems to be plain and unambiguous. It provides that the 'defense of contributory negligence and of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.'

As to the law of contributory negligence:

In *Ladow v. Oklahoma Gas & Electric Company*, 28 Okla. 15, 119 Pac. 250, it is said:

"Contributory negligence is nothing more nor less than negligence on the part of the person injured, and the rules of law applicable to the negligence of a defendant are applicable thereto. *Pitman v. City of El Reno*, 2 Okla. 414, 37 Pac. 851. Negligence, as defined by section 2830, Comp. Laws of Oklahoma 1909, is as follows: 'The terms "neglect," "negligence," "negligent," and "negligently," when so employed, import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.'

In 29 Cyc. 505, it is said:

"Contributory negligence in its legal significance is such an act or omission on the part of plaintiff, amounting to an ordinary want of care, as concurring or co-operating with the negligent act of defendant is the proximate cause or occasion of the injury complained of."

In *Little v. Hackett*, 116 U. S. 366, 6 Sup. St. 391, 29 L. Ed. 652, it is held:

"That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the

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direct cause of the injury, or in his omission of duties which, if performed, would have prevented it."

As to the law of assumption of risk:

In *Sans Bois Coal Co. v. Janeway*, 22 Okla. 425, 99 Pac. 153, it is held:

"Assumption of risk 'is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk.'"

See 1 Words and Phrases, 589, where the following cases are cited: *Bauer v. American Car & Foundry Co.* [132 Mich. 537] 94 N. W. 9, 10 (citing *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 301, 37 C. C. A. 501, 48 L. R. A. 68); *Atchison, T. & S. F. Ry. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, 317.

The foregoing instructions given by the court, in the light of the authorities just quoted, appear free from reversible error on any point urged against them by defendant, although the jury is thereby informed that the plaintiff's decedent "did not assume any risk which might be caused by the negligence of defendant" and is nowhere informed that the defenses of contributory negligence and assumption of risk are questions of fact of which they are the exclusive judges. The defendant neither in brief or oral argument insists upon this omission as error. The omission is in accord with the contention of defendant both in the trial court and here, and the error, if any, is waived.

In *Citizens' Bank & Trust Co. v. Dill*, 30 Okla. 1, 118 Pac. 374, it is held:

"It is the rule and repeated holding of this court that alleged errors, other than those affecting jurisdiction, not specifically pointed out and insisted upon in plaintiff in error's brief, will be treated as waived."

It is urged upon the authority of *Gilbert v. Burlington, C. R. I. & N. Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27, that the definition of contributory negligence as given in the court's foregoing

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instruction number two is not correct; but we are unable to find in that case any authority for its condemnation, although it is there held:

"The test of contributory negligence is whether or not the want of care directly contributes to the injury, not whether it is the more proximate cause of it than the negligence of the defendant. If it directly contributes to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it."

In the fifteenth instruction requested by the defendant and refused by the court it is stated:

"You are instructed that the test of contributory negligence is whether or not the want of care directly contributed to the injury, not whether or not it was the more proximate cause of it than the negligence of the defendant. If it directly contributed to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it."

This instruction merely emphasizes and illustrates, by more specific and a different form of statement, a proposition of law that is fairly embraced in the foregoing instructions given by the court.

In *St. Louis & S. F. R. Co. v. Walker*, 31 Okla. 494, 122 Pac. 492, it is held:

"It is not error to refuse to give an instruction that correctly states the law, if substantially the same instruction is embodied in the charge of the court to the jury, and the charge, taken as a whole, correctly states the law applicable to the facts in the case."

To the same effect see the following cases: *Standifer v. Sullivan*, 30 Okla. 365, 120 Pac. 624; *National Drill & Mfg. Co. v. Davis*, 29 Okla. 625, 120 Pac. 976; *Scott v. Vulcan Iron Works*, 31 Okla. 334, 122 Pac. 186; *Eisminger v. Beman*, 32 Okla. 818, 124 Pac. 289; *Enid City Ry. Co. v. Reynolds*, 34 Okla. 405, 126 Pac. 193; *Enid Electric & Gas Co. v. Decker*, 128 Pac. 708; *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089.

The sixteenth instruction requested by defendant and refused by the court reads:

"You are further instructed that the mere fact that the defendant did not block the frogs, guard rails, and angles between

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the side tracks and the rails of its main track will not warrant you in finding that the defendant was negligent, and such omission on the part of the defendant does not amount to negligence as a matter of law."

It may be that this instruction was intended to present the idea that negligence could not be predicated upon the unblocked condition of the space between the convergent rails where the decedent's foot was caught, upon all the evidence relating to that subject; but it was susceptible of being understood as less comprehensive of the evidence to which it relates, and as meaning that proof of nothing more than the unblocked condition of this space was not sufficient proof of negligence on the part of defendant, a meaning less favorable, of course, to defendant than the former, if we assume, as we will for the purpose of present discussion, that the evidence as a whole on this subject was not sufficient to show negligence. In other words, assuming for the present purpose only that defendant was entitled to an instruction to the effect that the unblocked condition of the space between the guard and main line rails, under all the evidence, including the evidence as to the peculiar situation and right use of this space and the effect and custom of blocking, did not constitute negligence, was it material, in view of the additional evidence, to determine whether the mere fact that the defendant did not block the frogs, guard rails, and angles between the side track and the rails of its main track, might constitute negligence; and did the court err in refusing the instruction merely as not presenting to him a question based on all the evidence relating to this subject? The evidence shows, and indeed it is a matter of common knowledge, that such open spaces as that in which the decedent's foot was caught are dangerous, especially in the nighttime, to employees working in such a yard; and the evidence further shows not only that such danger may be eliminated by blocking, but that of three other roads, for which the only witness questioned on this subject had worked, two of them used the block system, and the other, like defendant, did not.

The decided cases upon the question presented by the instruction under consideration are not in harmony; and this lack of harmony is reflected in the following authorities:

In 3 Elliott on Railroads, 1272a, it is said:

"It is generally held that the operation of a railroad without blocking its frog, switches, or guard rails is not negligence. It is certainly not negligence as a matter of law in the absence of any statute upon the subject, although there are cases holding that the question is for the jury."

In 1 Labatt on Master and Servant, 69, it is said:

"The position taken in some jurisdictions seems to be that a jury may properly infer negligence from the mere fact that a frog or guard rail was not blocked. The obvious complement of the doctrine is that the court cannot say, as a matter of law, that culpability is imputable where nothing more appears than that there was a want of blocking. Another view is that the servant, in order to make good his right of recovery, must do more than establish the want of blocking. That is to say, he has the burden of proving that frogs, etc., are not reasonably safe for the purposes which they are designed to subserve, and must also show that on the whole, the use of the block would be prudent, in that it would guard against dangers in one direction, without introduction of new perils in another. * * * He cannot recover merely upon evidence that an increase of safety is obtained by using the blocks. * * * In many of the cases the circumstances with reference to which the question of reasonable safety has been considered has been the common usage of railway companies. In order to estimate the doctrinal significance of these decisions, the theory held by the courts which rendered them must be taken into account. In some jurisdictions, * * * proof that it is the common usage of railway companies not to block frogs or guard rails will prevent recovery, as a matter of law. In others, such evidence is merely treated as an element proper for the consideration of the jury. A conception sometimes relied upon has been that the risk created by the unblocked frogs was obvious, and therefore assumed. In one case this seems to stand as the specific and differentiating reason upon which recovery was denied. But most of the decisions in which phraseology indicative of the conception is employed emanate from courts of which at least a part would deny the master's liability, even apart from this consideration."

In many of the decided cases it does not appear that any nice distinction was made or necessary to be made to a correct disposition of the case between negligence on the part of the railroad company and assumption of risk on the part of the em-

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ployee; and the courts, in holding negligence could not be predicated upon the want of blocking, have generally held in the same cases that the employee assumed the risk, while the courts holding that the question of negligence in permitting the unblocked condition of such spaces was for the jury have generally held in the same cases that the employee did not, as a matter of law, assume the risk. Indeed, in all the jurisdictions in which we have found decided cases in point there has been no imperative necessity for differentiating between want of negligence on the part of the railroad company and assumption of risk on the part of the employee; but in this jurisdiction, where the defense of assumption of risk on the part of the decedent is a question of fact for the jury, the court must of necessity differentiate in determining whether, as a matter of law, there is evidence warranting the jury in finding the defendant guilty of such negligence; and the value of the decided cases in such other jurisdictions as precedents for our guidance in finding this line of demarcation is not so great as it otherwise would be. There was another subject of negligence presented by the general instructions to the jury upon which the verdict might rest; and it was not necessary for the trial court to determine whether negligence in the defendant could be predicated upon the unblocked condition of this particular space under the evidence in this case, unless the question was fairly presented to him by the instruction under consideration.

Assuming, without deciding, that defendant would have been entitled to have the jury instructed that negligence could not be predicated upon the unblocked condition of this particular space under the evidence in this case, upon the theory that it was necessary for plaintiff to have further shown, and that she did not show, that blocking would not have introduced any new danger nor involved any unreasonable expense, or that the same is a customary safety device for such space, was the trial court not, in the light of what has already been said, justified in refusing it because it omitted material elements or facts on the subject to which it related and left undisposed of the effect of proof of safety in blocking and the peculiar situation and purpose of this guard rail and space? If this instruction had been given, the

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jury would have been left without guidance as to the effect of the proof of safety to employees in blocking and of the peculiar situation and purpose of this guard rail and space upon the question of negligence in this respect; and it was not material for the court or jury to determine whether the mere proof of want of blocking, considered apart from the proof of safety to employees in blocking and the peculiar situation and purpose of this particular guard rail and space, was sufficient to support a verdict against defendant,

In Hughes Instructions to Juries, 27, it is said:

"An instruction which omits any material element or fact on the subject to which it relates is defective, and for that reason it is properly refused. Such defective instructions, though correct in other respects, may be refused."

In 38 Cyc. 1627-1628, it is said:

"Instructions which ignore or exclude from the consideration of the jury evidence which is competent and material to the issue involved are erroneous, and this is so, although the evidence is slight; and it is of course proper to refuse instructions which are defective in this respect."

It may be, and, so far as we have examined the cases, is true that this rule is supported only by cases in which the instruction requested and refused was more favorable to the party asking it than it would have been if it had embraced the omitted facts on that subject; and it may be that, as a general rule, an instruction cannot be refused when less favorable in such respect to the party asking it than such party was entitled to have it; but in a case like this, where there was another subject submitted to the jury upon which negligence might have been predicated, and where the requested instruction may have been understood by the trial court as impliedly admitting that proof of facts in addition to the mere fact of the unblocked condition of the space might justify the predication of negligence upon such unblocked condition of this space, and where the defendant does not request an instruction involving the consideration by the trial court of the effect of all the evidence relating to this subject apart from the other subject of negligence, we doubt if it can be said that the question of sufficiency of the proof of negligence upon

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this one subject of negligence was fairly presented to the trial court for decision.

In the foregoing discussion of this requested and refused instruction we have assumed that, upon all the evidence, the court should have instructed, if it had been requested, that negligence against the defendant could not be predicated upon the unblocked condition of the space between the convergent rails in question under all the evidence; but is it true that it could not? It is indisputable that no negligence is found by failure of a master to adopt a device which, so far as it appears, has not been discovered or come to be known as a practical utility, but this rule does not mean that railroad companies are not bound to keep themselves reasonably abreast with approved methods, so as to lessen the danger attendant on the service, and, while they are not required to adopt every new invention, it is their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances. *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 South. 276; *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 South. 764. There has been such improvement in the machinery and appliances used by railroads, for the better security of life, limb, and property, that it would be inexcusable to continue the use of old methods of machinery and appliances known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer, and which are in general use by well-regulated railroads. *Louisville, etc., Ry. Co. v. Allen*, 78 Ala. 494; *Loyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Gulf, etc., R. Co. v. Warner* (Tex. Civ. App.) 36 S. W. 118; *Tennessee, etc., R. Co. v. Kyle*, 93 Ala. 1, 8 South. 764, 12 L. R. A. 103; *Greenlee v. Southern Ry.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; *Harden v. N. C. R. Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; *France v. Rome, etc., Co.*, 88 Hun, 318, 34 N. Y. Supp. 408; *Burke v. Witherbee*, 98 N. Y. 562.

In the case of *France v. Rome, supra*, the court held that the best known or conceivable appliances need not be furnished, but that the test was such as a prudent man would furnish if his life

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were exposed to the danger that would result from unsuitable or unsafe appliances.

In a note to 1 Labatt, *supra*, it is said:

"The following vigorous argument by Lewis, J., in his dissenting opinion in *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786, is worth quoting: 'That the frogs were dangerous is not disputed, but it is contended that they were the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded, and situated, as this one was, in a place where there are many tracks, and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightfully so found. Nor, upon this point, are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of "filling" them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the frogs ought always to be filled, as a protection to switchmen; and this is so well understood, he says, that the laws of some states expressly require it to be done. And why should they not be filled? Why should the servant be exposed to unnecessary risks that can so easily be guarded against? Is the rule that the master must exercise reasonable or ordinary care a meaningless phrase—the mere jingle of words? I think not.'"

And this reasoning, as applied to the space in which decedent's foot was caught, appeals to us very strongly.

The following cases cited in the same note tend to support the view that the question of negligence in the unblocked condition of frogs, angles or guard rails is for the jury: *Sherman v. Chicago, M. & St. P. Ry.* (1885) 34 Minn. 259, 25 N. W. 593; *Trott v. Chicago, R. I. & P. R. Co.* (1901) 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722; *Mayes v. Chicago, R. I. & P. Ry. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Hamilton v. Rich Hill Coal Mining Co.* (1891) 108 Mo. 364, 18 S. W. 977; *Missouri, P. R. Co. v. Baxter* (1894) 42 Neb. 793, 60 N. W. 1044; *O'Neill v. Chicago, R. I. & P. Co.* (1901) 62 Neb. 358,

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86 N. W. 1098; *Holum v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 299, 50 N. W. 99. A case which also tends to support the same view is *Union P. R. Co. v. James* (1896) 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. Ed. 236; but the rulings were on points of procedure. And the case of *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391, seems to commit the Supreme Court to the theory that evidence merely of the want of blocking is not enough to establish culpability. Also see, as holding that question for the jury, the following cases: *McManus et al. v. Oregon Short Line R. Co.* (1906) 118 Mo. App. 152, 94 S. W. 743.

In *Union Pacific R. Co. v. James*, *supra*, it is held in the syllabus:

"Testimony by plaintiff that the frog in which he was injured was unblocked at the time of the accident is sufficient to carry the question to the jury, though a number of witnesses testified that, just after the accident, the frog was found to be properly blocked. * * *"

But it is said in this case:

"The charge in the petition was that the frog was not, and never had been, blocked. The answer denied this fact, and did not assume to set forth as a defense that it had once been blocked, and the block misplaced without the knowledge of or notice to the railroad company. The railroad company was apparently content to rest its defense upon the single question of the existence of blocking at the time of the injury. The testimony went to that alone."

The argument first advanced by counsel for the railroad company on motion for new trial in that case was that "even if the frog was unblocked, that fact, of itself, would not make defendant liable for the injuries resulting therefrom; that the proof must go further, and bring to the defendant knowledge of such unblocked condition;" and the Supreme Court held that the issues made by the pleadings and the silence of the testimony in respect to the prior situation narrowed the inquiry of the injury to the single matter of the condition of the frog at the time of the accident. The question as to whether negligence could be predicated upon the unblocked condition of a frog or other angle in a case

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where the railroad company did not use the block system was not presented by that case.

In the earlier case of *Southern Pac. Co. v. Seley*, *supra*, as reported in 14 Sup. Ct. 530, it is held in the syllabus:

"It is not negligence to use unblocked frogs in a railroad freight yard, whereby the feet of employees coupling cars are liable to be caught, it appearing that unblocked frogs are generally used in the same section of the country, and that it is doubtful whether they are not the better kind."

But in that case the decedent put his foot into the frog in attempting to make a coupling and, although warned to take it out, did the same thing immediately afterwards, when he was killed; and the Supreme Court said, as a matter of law, he assumed the risk and was also guilty of contributory negligence.

These are the only cases we find decided by that court in any way involving the question here; and it will be seen from what has already been said as to them that they are not distinctly and clearly in point here.

The evidence as to the practicability of a block in the space between the guard rail and main line rail in question here is certainly meager and unsatisfactory; but, in view of the great danger involved in such open spaces, the situation of this particular space, the absence of any appearance of danger or impracticability in blocking from the facts proven, and the safely assumed advantageous situation of the defendant with respect to ability to produce expert evidence which it did not produce as to the same, we are unable to say, as a matter of law, that negligence could not be predicated upon the unblocked condition of this space under all the evidence relating to that subject. In saying this, we are not unmindful of the fact that the burden of proof was upon the plaintiff; but, in the light of all the facts and circumstances we have stated, we are unable to say that the proof was not sufficient to go to the jury.

The defendant further assigns error in that the court (sixth specification) refused to sustain demurrer to evidence and (thirteenth specification) refused peremptory instruction, also (fourth specification) the verdict of the jury is not sustained by suffi-

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cient evidence, and (fifth specification) the verdict of the jury is contrary to law.

The question of negligence in the speed at which the train was backed was not submitted to the jury—the question of negligence in permitting the unblocked space between the convergent rail and the defective condition of the equipment for uncoupling only being submitted.

About two o'clock on the morning of March 15, 1909, defendant's extra freight train, consisting of about twenty cars, more or less, came from the south into its south yard and stopped south of the switch at the north end of the same, at Francis, Okla. It was the duty of defendant's car inspector, W. J. Thrasher, with his helper, Wilcox, to thereupon take charge of the train, inspect the cars, mark those in bad order by placing a red "bad order" card on them, and when through inspecting to surrender the train to plaintiff's decedent, S. H. Long, the foreman of the switch engine crew; and accordingly this inspector, with his helper, took charge of this train and commenced inspection with the car on the north end of the train about the time the road engine was uncoupled and taken away. They proceeded with the work of inspection along the cars toward the south, the inspector on the west and his helper on the east side, until they had inspected three, four, or five cars; but according to the testimony of the inspector, at this time the switch engine coupled onto the car from which the road engine had been taken and commenced to draw the entire train of cars to the north of the said switch for the purpose of switching, while the testimony of the yardmaster was to the effect that the work of inspection had been completed before the work of switching was begun. The inspector had exclusive control and could, it seems, have prevented any movement of the cars until he had completed his inspection; but, instead, according to his testimony, he simply held his light so as to inspect them as best he could as they passed him, with intent to make a more careful and thorough inspection at some subsequent time. He observed that all the draft bolts on one side of a box car except one were broken; and as Frisco coal car No. 11935 passed him he observed that a queen-

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post used to support a truss rod was loose and that a drawbar in the coupling equipment in one end of the car seemed drawn out a little too long; but observed no defect in the equipment for uncoupling; and he did not put the usual "bad order" card on this car. After the train had passed him he crossed to the east side of the main track upon which it had gone north and followed north to where S. H. Long, plaintiff's decedent, was standing, somewhere near but north of the switch at the north end of this yard.

S. H. Long at this time, as foreman of the switch engine crew, and in discharge of his duties as such, after a train of cars was turned over to him by the inspector, had the control over the same, for the purpose of switching and placing cars, similar to that a conductor on the road has over his train.

In this south yard there were two tracks on either side of the main line on which the train of cars had gone north as stated. The caboose, due to be placed on the caboose track, and a box car, said by Martin J. De Long, defendant's night yardmaster at the time, to have been in bad order and due to be placed on the repair track, had been left on the main line at the time the train of cars were first taken north by the switch engine; and it appears that, about the time the inspector approached plaintiff's decedent somewhere near but north of the switch mentioned, as above stated, three cars on the rear of the train had been "kicked" onto and cut off and left on the second track west of the main line, known as the stock track. About this time the inspector, according to his testimony, informed plaintiff's decedent that "this car" (referring to Frisco coal car No. 11935, which was about to pass, was passing, or had passed where they were standing) "and a box car is a bad order;" and plaintiff's decedent acknowledged the information only by asking: "How bad is the box car?"

The evidence does not clearly show how near the inspector was to either "this car" or to plaintiff's decedent at the time, nor throw any further light upon the question as to whether plaintiff's decedent actually received the information and understood therefrom that Frisco coal car No. 11935 was in bad order, and his inquiry suggests a question for the jury as to whether he did

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• actually receive the information intended by the inspector to be given him as to "this car," or whether he did not inquire about the extent of defect in the coal car because the same was in view.

It was the duty of plaintiff's decedent as switch engine foreman, subject to the instructions from the night yardmaster, said Martin J. De Long, to switch and place for future use all the cars in the train, except "bad order" cars, which his duty required him to place on the repair track for repairs. It appears that the only instruction given plaintiff's decedent by the night yardmaster at the time this train came in was to take out from the train the four or five cars for Holdenville, a station a short distance away; and it appears that the four or five cars, including Frisco coal car No. 11935, were due to go at once to Holdenville, unless this defective car should have been detained for repairs.

After "kicking" the three cars down on the stock track as already stated, and after the inspector had walked south about 50 or 60 yards from plaintiff's decedent, the train was backing south for the purpose of "kicking" this Frisco coal car No. 11935 off down the main track toward the caboose and the box car with it when the accident resulting in the death of plaintiff's decedent occurred; but it does not appear certain whether this Frisco car No. 11935 was being so placed for the purpose of being put into the Holdenville train, as the night yardmaster testified, or for the purpose of being afterwards put on the repair track with the bad order box car, either inference being apparently possible under the testimony. The switch engine crew consisted of the engineer, the fireman, and one helper by the name of Parker, who was temporarily and excusably a short distance away from this work of switching at the time of the accident; and plaintiff's decedent evidently undertook to and did in fact uncouple Frisco coal car No. 11935 while it was being so "kicked" down the main line to the desired position, and lost his life in so doing.

"This car" and the one to which it was coupled were each provided with automatic couplers, and each provided with a lever extending along the end out to the side of the car for use in uncoupling by the switchman without going in between the cars. Plaintiff's decedent was on the east side of these cars, and the

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uncoupling lever on Frisco coal car No. 11935 was also on the east side of the coupling equipment; but the lever for uncoupling the other car was on the opposite and west side of the coupling equipment, beyond his reach. The "dead wood" over the drawbar on the end of this Frisco coal car No. 11935 had in the course of time been beaten off underside so as to permit the drawbar to go back under the upper part so far as to take under it the lock block or coupling pin in the equipment of this car, and thus make it impossible to effect an uncoupling by use of the lever on this side of the train or by lifting this lock block or coupling pin by hand, so that he was confronted by the alternative of stopping the train or going between the moving cars in order to effect an uncoupling.

It appears that some rule of the company not in evidence, except by the admission in a general way of a witness on cross-examination, forbade the uncoupling of cars by going between them while in motion; but it also appears that the practice of the employees of the company at Francis was to effect uncouplings by doing so, while the trainmaster, who had authority to discharge such employees for violating rules, was in the yards in both day and night time while it was being done, as well as other times, although there is no proof that the trainmaster actually saw and acquiesced in such violation of rules other than may be found in the evidence of his opportunity to have seen the same.

The inspector had, at the time of the accident, walked south some 50 or 60 yards, as already stated, when, being on the main line, down which Frisco coal car No. 11935 was being "kicked," heard the cars coming at such speed as to cause him, in a sense of precaution against danger, to look back to see how near they were to him; and, in looking back he saw what appeared to be a spark as it flew out to one side of the train. The inspector thought that a brake beam had fallen and had thrown off this spark, and he walked back to where it appeared to be to investigate. When he got near enough he saw, by the use of his lantern, plaintiff's decedent mashed on and between the guard rail to the east and the east rail of the main line about a rod south of the switch.

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At the time of the accident, the night yardmaster was on or near the stock track some 100 or 150 yards to the south and away from the place thereof; and, after his attention was attracted in that direction by the exhaust of the engine and the speed of the cars, he was informed of the same by the inspector.

The inspector and the night yardmaster each testified to stopping the train by signalling as soon as the accident was discovered; and each testified that the train was stopped in obedience to his signal; but the night yardmaster testified that the engineer thereupon pulled the train forward the length of half a car and pulled one pair of trucks over plaintiff's decedent, and, when cross-questioned as to whether or not the sudden stopping of the engine might have caused the cars to go forward on recoil ten or twelve feet, insisted that he knew by the exhaust of the engine that the engineer had gone forward after stopping.

The only witnesses who claimed any personal knowledge of the accident or any fact immediately connected therewith were the night yardmaster, Martin J. De Long, the principal witness for the plaintiff, who soon after the accident had been discharged by defendant because of unsatisfactory service according to a statement in his service letter, and the car inspector, W. J. Thrasher, the only witness for the defendant, still in its employ—nor was there any other witness in the case except the plaintiff; and neither party accounts for the absence of the testimony of the engineer, the fireman, the inspector's helper, or the plaintiff's decedent's helper.

The night yardmaster testified for plaintiff that at the time of the accident the train was being backed at a speed of at least twelve miles per hour; but, on cross-examination, he was confronted by a report he made immediately after the accident stating the speed as six miles per hour. He at first intimated that this report was not correct and was made in fear of loss of his job, but later admitted it must have been true and that he must have been mistaken in his testimony that the speed was at least twelve miles per hour, as he would not have made a false report, although, on later redirect examination with respect to his report of six miles per hour, he finally said it always seemed to him that

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it was going faster than that. This witness also testified that they "hardly ever 'kicked' them that hard, though, to roll that far"—referring to the speed of the train at the time of the accident.

On cross-examination, the car inspector, a witness for the defendant, at first testified the speed of the train at the time of the accident was ten miles per hour, but later testified it was from six to eight miles per hour, and finally said he did not know.

When the train was stopped by the signals mentioned, plaintiff's decedent was found to be dead under the eighth car from the one he had evidently undertaken to uncouple; and it was found that his left foot had been caught and was fastened between the guard rail and the east main line rail, and the wheels of the cars had passed over his left ankle, cutting it off, and had crushed his left leg, his body, and one of his arms between the guard rail to the east and the east rail of the main line about a rod south of the switch—he was evidently dead before the accident was discovered by either of the witnesses, one of whom said the passing of one of the trucks over him would have killed him. The left foot of plaintiff's decedent was fastened in the space between these convergent guard and main line rails, with toe to the south, indicating that while in between the cars in motion his foot had passed in, where the width between the two rails was sufficient to receive the same, and had been forced along between these convergent rails to where they were so close together at the top of the rails that he could not extricate it; and he had been thus thrown down upon the rails and run over and killed by the moving train immediately after he had effected the uncoupling.

The convergent rails (including guards, frogs, and angles) in defendant's yards at Francis at the time of the accident were unblocked, and it appears from the evidence that by placing blocks of wood or metal between such convergent rails where one's foot might enter the danger of such accidents could have been obviated; but it does not appear from the evidence what the cost of so doing would have been, nor whether such blocks increased the

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danger of derailment or any other danger. The plaintiff's witness, the night yardmaster, testified to knowledge of such blocking being at two places on another road in Oklahoma, and on still another road at Amarillo, Tex., where he was employed as switchman at the time he testified; but, in addition to the defendant, he specified another road which did not block its frogs and angles when he worked for it. It appears that there was no eyewitness to the accident, at least no one was produced upon the trial who saw it; and the only proof as to what was done by plaintiff's decedent or whether the car was in motion or standing still at the time he went between them is found in such inferences as the jury might properly have drawn from the foregoing facts. There is no evidence that he did or did not signal the engineer; but it seems quite certain that plaintiff's decedent went between the cars for the purpose of effecting an uncoupling; and whether he first, in ignorance of the defective condition of the uncoupling equipment on coal car No. 11935, attempted to effect the same by use of the lever from the outside and, failing, then went between the cars and attempted to draw the lock block or pin by hand in the coupling equipment of that car, and finally effected an uncoupling by drawing the lock block or pin in the coupling equipment of the other car, was left entirely to inference by the jury from the aforesaid proven facts and common knowledge as far as permissible in respect to such matters; but at the time he was killed an uncoupling had been effected by lifting the pin in the coupling equipment of such other car; and the evidence tends to show he had the pin in hand when his foot was caught and held to it as long as he could. It appears that the next cars were to be switched to the stock track, and that the uncoupling of Frisco coal car No. 11935 should have been effected before the switch was reached; but it does not appear otherwise than from his position north of the switch a short time before at what place plaintiff's decedent first attempted it.

It will be seen from what has already been said in discussing another specification that defendant's sixth, thirteenth, sixteenth, fourth, and fifth specifications of error cannot be sustained; but, assuming, for the purpose of discussion, that negligence cannot

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be predicated upon the unblocked condition of the space between the guard and main line rails, is there not evidence sufficient to have gone to the jury on the question of negligence in the defective condition of the equipment for uncoupling? The fact that the railroad company had in operation a car with defective drawheads, and that a coupling could not be properly made in the way it could have been had the coupling device been in repair, tends to show negligence on the part of the railroad company, according to *Gilliland v. Charleston, etc., R. Co.*, 86 S. C. 137, 68 S. E. 186.

In *Northern Pac. R. v. Tynan*, 56 C. C. A. 192, 119 Fed. 288, it is held:

"It is the duty of a railroad company, which it owes to its employees as well as to the public, to use reasonable care to see that the cars used on its road are in good order and fit for the purposes for which they are intended; and an employee has the right to rely upon the performance of this duty. * * *

In *Houston, etc., R. Co. v. Myers*, 55 Tex. 110, it is held:

"The company is required, by the plainest dictates of reason and rules of law, to furnish to its servants operating trains good, sound, and suitable machinery, apparatus and material necessary in the conducting of that business; and generally the company is liable to its servants for injuries resulting from the use of defective machinery, apparatus, or material in the discharge of their duty, provided the company knew, or could have known by reasonable care, that the same was so defective or unfit for the purposes for which it was furnished."

In *Troxler v. Southern R. Co.*, 122 N. C. 902, 30 S. E. 117, it is held that a railroad company was negligent in using on its cars drawheads that were defective and dangerous; and in *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa, 406, 94 N. W. 906, it is held that, when a defect in a drawhead is shown to have existed such a length of time that the company ought to have been aware of it, there is negligence.

In *Bradshaw v. C., R. I. & P. Ry. Co.*, 58 Kan. 618, 50 Pac. 876, where the evidence showed that if the middle projection had been whole it would have prevented the coupler from passing back far enough to injure the hand of the switchman, but, the whole front of it being broken out, the short end of the

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coupler slipped in between the upper and lower projection far enough to allow the long end to strike his hand; and it being shown that, although the switchman had not noticed the broken condition of the car, the accident occurring at night, and had no knowledge of the defect before the accident, it had been used in its broken condition a month or more, the court, in reversing the judgment sustaining a demurrer to the evidence, said:

"There certainly was ample evidence of neglect on the part of the company. A defective appliance was in use in connection with one of the most hazardous branches of the company's business. It had been used in that condition for a sufficient time to enable the company, in the exercise of reasonable care, to discover the defect."

In the case of *Belt Ry. Co. v. Confrey*, 209 Ill. 344, 70 N. E. 773, it was held that, where the evidence tends to show that a reasonably careful examination would have disclosed to the inspector that the coupling apparatus was defective, the determination of the issues of negligence is one for the jury.

In the case at bar the jury was left to infer from the very indefinite statement that the defect, consisting of the "battered-up" condition of the bottom of the "dead wood," was "not new" and "was not what you might call old," how long this defect had existed; but we cannot say, as a matter of law, that it was not shown by this evidence to have existed long enough to charge the defendant with knowledge. It was also for the jury to say, under the facts in this case, whether the inspector, and through him the defendant, by reasonable inspection, should have discovered this defect immediately before the decedent undertook to effect the uncoupling resulting in his death; and it was for the jury to say whether defendant was guilty of negligence in permitting that defect without informing the decedent of the same, and whether he was sufficiently informed.

In *Booker Tobacco Co. v. Waller*, 38 Okla. 47, 131 Pac. 537, the Supreme Court of this state following *Fidelity Mutual Life Ins. Co. v. Stegall et al.*, 27 Okla. 151, 111 Pac. 389, it is held:

"It is only when the evidence with all the inferences the jury could justifiably draw from it will be insufficient to support a verdict for plaintiff, * * * that the court is authorized to

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direct a verdict for defendant; and, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions."

A case will not be reversed for want of evidence, if there is any evidence, including every valid inference the jury could have drawn from the same, reasonably tending to support the verdict. See the following cases: *Creek Bank & Trust Co. v. Johnson*, 33 Okla. 696, 127 Pac. 480; *St. Louis & S. F. R. Co. v. Dale*, 36 Okla. 114, 128 Pac. 137; *Hampton v. Culberson*, 29 Okla. 468, 118 Pac. 134; *American W. & P. Co. v. Spear*, 31 Okla. 22, 119 Pac. 586; *Grimes v. Wilson*, 30 Okla. 322, 120 Pac. 294; *Federal Trust Co. v. Spurlock*, 34 Okla. 644, 126 Pac. 805; *Brissey v. Trotter*, 34 Okla. 445, 125 Pac. 1119; *Stringer v. Hart*, 36 Okla. 264, 128 Pac. 135; *T. S. Reed Grocery Co. v. Miller*, 36 Okla. 134, 128 Pac. 271.

The defendant further assigns error in that (third specification) the damages awarded are excessive and "appear to have been given under the influence of passion and prejudice."

Section 7, art. 23¹ (section 356, Williams' Ann. Ed.), Constitution of Oklahoma reads:

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

The question of recovery for the pain and suffering of the intestate is neither involved nor claimed in this proceeding. *A., T. & S. F. Ry. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683; *Farmers' State Bank v. Stephenson et al.*, 23 Okla. 695, 102 Pac. 992; *State ex rel. v. Cullison, Judge*, 31 Okla. 187, 120 Pac. 650. The damages recoverable have reference to a pecuniary loss. *St. Joseph & Western R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *A., T. & S. F. Ry. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877. 52 Am. Rep. 543; *C., K. & W. R. Co. v. Bockoven*, 53 Kan. 279, 36 Pac. 322. See, also, *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Telfer v. Northern R. Co.*, 30 N. J. Law, 188; *Safford v. Drew*, 10 N. Y. Super. Ct. 627; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Ill. Cent. R. Co. v. Weldon*, 52 Ill. 290; *City of Chi-*

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cago v. Scholten, 75 Ill. 468; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Kesler v. Smith*, 66 N. C. 154; *Baltimore & O. R. Co. v. State, Use of Kelly et al.*, 24 Md. 271; *Penn. R. Co. v. McCloskey*, 23 Pa. 526; *Same v. Vandever*, 36 Pa. 298; *Same v. Butler*, 57 Pa. 335; *Same v. Goodman*, 62 Pa. 329; *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 336, 70 Am. Dec. 75; *M. & W. R. Co. v. Johnson*, 38 Ga. 409; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246; *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4, 64 N. W. 450; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Bertha Geiger v. Worthen & Aldrich Co.*, 66 N. J. Law, 576, 49 Atl. 918; *Donaldson v. Miss. & Mo. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391; *Nashville & C. R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Malott, Receiver, v. Shimer, Adm'x*, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

In *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 89 Ark. 326, 116 S. W. 678, it is said:

"It is contended that the verdict is excessive. Plaintiff's decedent was shown to have been 24 years of age, a man of good habits, healthy, intelligent, and industrious. He left no children. The case was therefore stripped of all elements of damage except as to the amount of his probable contributions to those dependent upon him. The evidence tended to show a present earning capacity at the time of his death and contribution to his wife of \$900 per annum. It tended to show also, and the jury were warranted in finding, that his earning capacity would probably have been increased—to what extent is a matter of speculation. It is shown that his wages had been increased from time to time, and that he was in line of promotion. According to the annuity tables, placing his contributions at \$900 per annum, computing at the rate of 6 per cent. per annum, the recovery should have been for \$10,845. Making due allowance for the probable increase in his earning capacity, we are of the opinion that the evidence is insufficient to sustain a verdict for more than \$15,000."

See, also, *Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 1199, 32 L. R. A. (N. S.) 825; *Tillar v. Reynolds*, 96 Ark. 358, 131 S. W. 969, 30 L. R. A. (N. S.) 1043; *St. Louis, I. M. & S. Ry. v. Raines*, 90 Ark. 398, 119 S. W. 665, 17 Ann. Cas. 1; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 185,

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91 S. W. 763, 113 Am. St. Rep. 85; *St. Louis, I. M. & S. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749; *St. Louis, I. M. & S. Ry. Co. v. Hitt et al.*, 76 Ark. 227, 88 S. W. 908, 990; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

In *St. Louis, I. M. & S. Ry. Co. v. Freeman*, *supra*, only the widow survived, and consequently the element of pecuniary damages for the loss to a child could not be considered in sustaining a verdict for \$15,000. There the intestate was 24 years of age; here he is 30 years of age.

In 13 Cyc. 375, 376, it is said:

"While the general rule is that the recovery must be confined to strictly pecuniary damages, the jury are not bound to any fixed and precise rules in estimating the amount of damages, * * * but may give compensation for any injuries, proceeding from whatever source, and their discretion in fixing the amount of damages should not be interfered with by the court, unless it has been palpably abused. The rule has been sometimes thus stated: 'To justify interference by the court with the verdict of the jury, it must appear that some rule of law has been violated, or else that the verdict is so excessive or grossly inadequate as to indicate partiality, passion or prejudice in the minds of the jurors.'"

In the case at bar the jury were not informed by the evidence or by instructions from the court as to the life expectancy of the plaintiff or her decedent shown by standard mortality tables, and there was no evidence of ancestral long life nor the physical condition of the decedent further than plaintiff's statement that he was in perfect health so far as she knew and was a strong man. The evidence showed that he was an affectionate man to his family; that he spent no money for foolishness, "only for necessary expenses"; that he was very industrious; that it was his custom to take his pay check and give it to plaintiff, who, after paying bills, put the balance in bank. Plaintiff was nearly 24 years old, the child, Hazel Long, was about two years old, and the decedent was a strong, healthy, and sober man 30 years old at the time of his death. During the three years of his marriage with plaintiff he had earned as high as \$160 per month while working for another railroad company, had commenced

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work for the defendant about 20 or 21 months before his death at \$50 per month, had earned \$120 per month as night yard-master for the defendant for an undisclosed length of time, ending about fifteen days before his death, and during the fifteen days or thereabout prior to his death had worked for defendant as foreman of its switch engine crew about an hour less time each day and at a little less than \$120 per month; but at time of death had saved only about \$200 in money.

The evidence is not entirely satisfactory as to actual financial loss sustained by plaintiff and the child, for whom she also sues; and under the law as already herein announced she could not of course recover more; but, in the light of the authorities just quoted, we cannot say, as a matter of law, that she and the child, during its minority, would not apparently have received from his earnings, if he had lived, enough to justify this verdict, nor that the jury might not properly have found from the evidence that they would have received the same.

The defendant further assigns error in that the court (sixteenth specification) overruled its motion for a new trial; but what has already been said in respect to the other assignments of error is believed to cover every question presented by this one; and we find no reversible error in the action of the court in denying the motion.

It follows that the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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FIRST STATE BANK OF MANNSVILLE v. HOWELL
et al.

No. 2823. Opinion Filed August 6, 1913.

Rehearing Denied December 23, 1913.

(137 Pac. 657.)

1. **PLEADING—Judgment on Pleadings—Effect of General Denial.** A motion for judgment on the pleadings was properly overruled, in an action in replevin, where the answer contained several defenses in addition to a general denial. The general denial raised an issue of fact, and did not render the pleading inconsistent, no matter what the other defenses may have been.
2. **SAME.** Ordinarily a motion for judgment on the pleadings is proper where the answer admits, or leaves wholly undenied, the allegations of the petition; but in replevin a general denial puts in issue every fact pleaded, and in such case a motion for judgment on the pleadings should be overruled.
3. **DAMAGES—Breach of Contract—Damages Recoverable.** Loss of profits, or damage to a crop, if within the contemplation of the parties at the time a contract is made, and was such a loss or damage as flowed directly or proximately from the breach of such contract, and is capable of accurate measurement or estimate, is recoverable in an action for damages for the breach of such contract.
4. **CHATTEL MORTGAGES—Assignee of Mortgage—Equities Between Parties.** In an action in replevin by the assignee of a nonnegotiable note and a chattel mortgage against the mortgagor to foreclose the chattel mortgage, it is competent to prove failure of consideration and damages caused by the fault of the original payee; such evidence is permissible only to defeat the assignee's right of possession, and not for the purpose of recovering damages from him.
5. **REPLEVIN—Measure of Damages—Wrongful Detention.** The measure of damages for the wrongful detention of a team of work mules is the usable value thereof during the time they were wrongfully detained.

(Syllabus by Robertson, C.)

Error from County Court, Marshall County;
J. W. Falkner, Judge.

Action in replevin by the First State Bank of Mannsville against J. L. Howell and others to recover possession of a team

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of mules for the purpose of foreclosing a chattel mortgage thereon. Judgment for defendants, and plaintiff brings error. Affirmed.

E. D. Slough, for plaintiff in error.

Chas. A. Coakley, F. E. Kennamer, E. S. Hurt, and Geo. S. March, for defendants in error.

Opinion by ROBERTSON, C. On December 15, 1908, one J. B. Wall, a merchant, sold to J. L. Howell two mules for \$275, said sum to be paid October 1, 1909. On the same day the said J. L. Howell executed and delivered to the said J. B. Wall two promissory notes, secured by chattel mortgage on the said mules and other property, one in the sum of \$275, the other in the sum of \$219.93, which said notes were also signed by Chas. Lewis, as surety. Wall, the merchant, was indebted to plaintiff in error in the sum of \$2,400 in the month of December, 1908, and shortly after the execution of the notes by Howell, as above set out, he indorsed and delivered to the said plaintiff in error said notes as collateral security for the payment of his indebtedness to the bank. In January thereafter Wall was adjudged a bankrupt. It may be fairly inferred, and is in fact alleged by the plaintiff in error, that the mules were charged on the books of Wall, the merchant, in the sum of \$275, together with merchandise and credit given for the notes, and that at the time the last item was furnished by Wall to Howell the latter was entitled to a credit of \$49.50; or, in other words, Howell had items charged on Wall's books sufficient to cover both notes, less the sum of \$49.50. At the time of the trial Wall and his bookkeeper, J. D. Tanner, were deceased. The defendant Howell answered plaintiff's petition by general denial, and, in addition, admitted the execution of the notes and mortgage, but denied that plaintiff was the owner, and entitled to maintain the action. He also alleged that the price of the mules was \$200 only, and that the excess, to wit, \$75, as shown by the note, was usurious interest; that by the wrongful taking of the property by plaintiff he was damaged in the sum of \$250, and that by breach of warranty as to the age of the mules he was damaged in the sum of \$80. He also alleged that he had a contract with Wall to furnish supplies for the year

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1909, and that by reason of Wall's failure to furnish such supplies he was damaged by having to work away from home, and out of his crop, for two months, at \$1 a day, when his team at work in the crop would have been worth \$3 a day, and, further, that he was prevented from planting his crop in time by reason of such failure to furnish supplies, and that therefore his crop was late, and was damaged by drouth in the sum of \$250. Plaintiff demurred generally to the answer, and especially to paragraphs 4 and 7; the first being with reference to usurious interest, and the latter with reference to damages occasioned by the failure to furnish supplies. The court sustained the demurrer to paragraph 7, but later sustained a motion to set aside the demurrer, and permitted said paragraph to stand. Plaintiff filed a motion for judgment on the pleadings, which was overruled. The cause was tried to a jury February 7, 1911, and a verdict was returned in favor of the defendant for the return of the mules or their value in the sum of \$100 each, and for \$100 damages for the wrongful detention of the same. Motion for a new trial was filed, considered, and overruled, and judgment was entered on the verdict, and plaintiff brings this appeal to reverse said judgment, and assigns as error: (1) The court erred in not rendering judgment for the plaintiff on the pleadings. (2) The court erred in setting aside the order sustaining a demurrer to paragraph 7 of defendants' answer. (3) The court erred in overruling motion of plaintiff for a new trial.

Judgment on the pleadings is a permissible practice in the courts of this jurisdiction when the state of the pleadings warrants such disposition of the case. The case in hand being one in replevin, the gist of the action is the wrongful detention of the property. Defendants answered by general denial, and, in addition, pleaded affirmative defenses. In the latter they admit the execution and delivery of the notes and mortgage, default in payment of which is made the basis of plaintiff's claim to the right of possession. At any event it was incumbent on plaintiff, before it could recover, to establish its right of possession. Even though the special defenses set up in the answer should fail, yet the defendants, under the general denial, had a right to defeat

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plaintiff's claim by showing right of possession in some third party. Hence such an answer, containing different defenses, is not an inconsistent pleading in replevin, and, where an issue of fact is raised, as it was in this case, by the general denial, it is not error for the trial court to overrule a motion for judgment on the pleadings. Ordinarily a motion for judgment on the pleadings is proper where the answer admits, or leaves wholly undenied, the material allegations of the petition; but in this case no such condition exists. It might in some cases be proper to award judgment on the pleadings where the answer does not deny all the facts alleged, but denies legal conclusions only; but we are again, in this case, met with the principle that a general denial in replevin puts in issue every fact pleaded in the petition. 11 Ency. P. & P. 1031. This being true, there was no error in the action of the trial court in overruling the motion for judgment on the pleadings as interposed by plaintiff. *Thomas v. Ray*, 48 Colo. 423, 110 Pac. 77.

It is next contended that the court erred in refusing to sustain plaintiff's demurrer to the seventh paragraph of defendants' answer. This paragraph in substance charged that at the time defendant executed the notes and mortgage in controversy the said Wall agreed to furnish Howell such supplies, out of his store, as would enable him to make a crop during the year 1909; that he failed and refused to do so, and, on account of such failure, Howell was compelled to work out for \$1 per day, when he should have been in his crop, and that the services of himself and team in his crop during such time was worth \$3 per day; that, on account of the fact that his team and other personal property was mortgaged to Wall, he was prevented from obtaining credit elsewhere, all of which was known to Wall at the time the notes and mortgage were executed; that, as a direct and proximate result of such failure and refusal on Wall's part to comply with the terms of his said agreement, and furnish Howell the supplies necessary to enable him to plant and care for his crop, he was compelled to and did neglect planting it for two months; and the same was damaged and his profits thereon reduced thereby in the sum of \$250. The notes were nonnegotiable, and any

defense Howell may have had as against Wall would be available to him as against plaintiff. No reply was filed by the bank to the affirmative matter set up in the answer, nor was there any motion to strike the same; but a demurrer was interposed, which at first was sustained, but later overruled, by the court, at the request of defendants, over the objection of plaintiff. The jury, by its general verdict, found that such an agreement as set up by paragraph 7 of the answer was the consideration for the execution of the notes secured by the chattel mortgage involved in this action, and by said verdict found for defendants on every material fact necessary to sustain his theory under the issues formed by the pleadings. This, therefore, brings us to the question, Is the damage to a crop such as charged and proved in this case such a one as would be recoverable in an action for the breach of the contract between Howell and Wall? Or, in other words, is the loss of prospective profits on a crop under the facts charged and proved a proper element of damage for breach of the contract set up in the answer and found to exist by the verdict of the jury? If this element (loss of profits or damage to crop) was within the contemplation of the parties at the time the contract was made, and was such a damage as flowed directly and proximately from the breach of the contract, and was capable of accurate measurement or estimate, then the verdict must stand; otherwise it must be set aside.

We find this proposition to have been carefully considered and this question decided by Harrison, C., in *Ft. S. & W. R. Co. v. Williams*, 30 Okla. 726, 121 Pac. 275, 40 L. R. A. (N. S.) 494, wherein it is said:

"It is well settled in this state that damages based upon prospective profits which would have been realized had the contract been performed may be allowed, providing they are fairly within the contemplation of the parties, are the direct natural consequence of the breach of the contract, and are susceptible of being ascertained with reasonable certainty."

In *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, the chief point in controversy was one relating to the proper measure of damages claimed by defendant by way of set-off to plaintiff's action. Plaintiff sued to recover the value of certain fertilizer

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sold and delivered to defendant. The defense set up was that plaintiff agreed to sell and deliver defendant 20 tons, at a stipulated price, with notice of its intended use. Plaintiff failed to deliver the full amount purchased, and defendant, not being able to obtain it elsewhere, failed to make as good crop on the land he had intended to use it on as on that which was fertilized. The land upon which the fertilizer was designed to be used was prepared and cultivated in a farmerlike manner. Upon a portion of it was used the fertilizer furnished under the contract, and this portion produced between 300 and 400 pounds of seed cotton to the acre more than that adjoining, which was also planted in cotton; the quantity and cultivation of each being the same. It was contended that the amount of defendant's damage for the failure of plaintiff to deliver the balance of the fertilizer is measured by the profits which he lost in the depreciated production of cotton on the land upon which he intended to use it. The court held that the rule or true measure of damages was in fact the difference in value between the cotton raised on the land on which the fertilizer was used and that raised on the adjoining land, of the same quality and cultivated in the same manner, on which no fertilizer had been used.

As a general rule in ordinary cases the true measure of damages, where the seller fails to deliver goods sold where the purchase price has not been paid, is the difference between the agreed price and the market price at the time and place of delivery, with interest, and this is on the theory that the purchaser can go on the market and purchase the goods from another by paying the difference in price. But, when this cannot be done, the rule does not apply. Such is the condition in the case at bar. And it is also true that ordinarily profits are not included in the injury for which compensation is made, and yet again it is frequently held that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

In *Bell v. Reynolds*, 78 Ala. 514, 56 Am. Rep. 55, the rule is stated as follows:

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"The true rule seems to be that profits which have been sustained as the natural consequence of the breach or wrongful act complained of are recoverable, unless they are objectionable either on the ground of remoteness or of uncertainty. Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent on collateral engagements and enterprises, not brought to the notice of the contracting parties, and not, therefore, brought within their contemplation, or that of the law."

Our own statute seems to contemplate such a rule, as may be seen by reference to section 2852, Rev. Laws 1910, where it is provided that:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which, *in the ordinary course of things, would be likely to result therefrom*. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin." (Italics ours.)

As was said hereinbefore, the notes and mortgage are but evidences of the principal contract alleged to have been made and entered into by Wall and Howell. This alleged contract is not denied by the bank by reply or otherwise. The jury found, as it had a right to find, that the contract was made as charged. Therefore we are bound to say that the parties, at the time they made the contract, had in mind the profits that would arise from the making of a crop; that was, and of necessity must have been, in contemplation of the parties at the time the mortgage was executed, for the mortgage covered all the crops to be grown by Howell as well as the mules in question. This being true, we have no hesitancy in saying that the rule fixing the measure of damages heretofore announced is not only supported by reason and authority, but by the statute above quoted. See, also, in support of this rule, *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 503, 5 Am. St. Rep. 479; *Joyce on Damages*, sec. 1374.

However, this evidence in support of this element of damage in the case at bar was competent only for the purpose of show-

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ing that the notes and mortgage had been satisfied, or that the consideration therefor had failed, and could not, on that account, be made to support a verdict for damages against the bank in this action in replevin. The only purpose in admitting such evidence was to show that the consideration for the notes had failed; hence no damage could be recovered from the bank by reason of Wall's failure to furnish the supplies in accordance with the terms of the contract, and for this reason, and this alone, it was not error for the court to permit paragraph 7 of the answer to stand, and to allow the introduction of evidence in support of the plea of failure of consideration in the notes, and thereby defeat the right of recovery in the replevin action. Of the correctness of the foregoing position, we do not think there can be any question. It is undisputed that there was such a contract made as alleged in Howell's answer; that its terms were broken by Wall; that Howell was damaged as alleged in his answer; the testimony was amply sufficient to sustain the verdict, which warrants us in finding that Howell's story is true, wherein he says that he could not get supplies from Wall; that, in order to support his family, he had to work away from home by the day, when his services, with the team, were required in his own crop, and were worth at least \$3 per day; that thereby his crop was planted late, and was caught by the drouth; that he had 25 acres of corn that made only five bushels per acre, while his neighbors, with the same labor on the same quality of land, made 25 bushels per acre, which was worth 50 cents per bushel. On this basis he showed a damage of \$250 on testimony wholly undisputed. Thus his damage was ascertainable by the plainest, easiest, and most accurate measure possible, by showing the loss of property occasioned by the damage done the crop. Making a crop was one of the principal thoughts the parties had in mind when the contract was made. It was for that purpose he made the contract; had he wanted to work out by the day, there would have been no necessity for the contract and mortgage. But, if he made a crop, he must needs make provision for the sustenance of his family and team while doing so, and, when he made the contract with Wall (the principal contract between them, evidenced par-

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tially by the notes and mortgage), it was in the contemplation of their minds that no crop could be made unless the supplies were furnished, and that to fail to furnish the supplies at the time they were needed could result only in damage to Howell, and therefore the allegation and proof to support the same were properly presented to the jury in order to make defendants' legitimate defense.

It is not sufficient objection to this conclusion to say that the damages sought to be recovered upon profits to be made on crops renders them too remote or speculative. As a matter of fact such damages, as has been pointed out in *Ft. S. & W. Ry. Co. v. Williams*, *supra*, are easily and accurately ascertainable, because they are not only within the contemplation of the parties at the time the contract was made, but are the direct and natural consequences of the breach of the contract, and are susceptible of being ascertained with reasonable certainty.

The court, in the case last above cited, in speaking of the manner of computing damages such as arise in this case, says:

"There is more or less inaccuracy in every action for damages for breach of contract; but, in order to justify a recovery in any case, assuming that a breach has been committed, there are two necessary elements to be considered: One that a damage has been done; the other that such damage is the result of the breach. The amount of the one should be computed with reasonable accuracy. The fact of the other must be determined with reasonable certainty. A less degree of accuracy is required in the former than of certainty in the latter; but neither is required to be absolute or beyond conjectural possibilities. Where it reasonably appears that a party has been damaged, and that such damage is the direct result of the breach, then a recovery is justified. The next step is to ascertain how much will reasonably compensate the injured party. This should be computed by the plainest, easiest, and most accurate measure which will do justice in the premises, and if, from the conditions in the contract, and the nature of the breach, it reasonably appears that the extent or amount of damages may be more readily, easily, correctly, and justly ascertained by applying the loss of profits as a measure, if it is evident that profits were lost, and the amount thereof can be calculated with reasonable accuracy, then such profits are the true measure to be applied."

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Hence, from the foregoing, follows necessarily the conclusion that paragraph 7 of defendants' answer stated good grounds of defense, and the court committed no error in refusing to set aside his order reinstating the same, or in refusing to sustain a demurrer thereto.

It is urged under the next assignment of error that the verdict is contrary to law, for that the evidence is insufficient to disprove that plaintiff was the owner and holder of the notes at the time of the commencement of the action, and to prove warranty as to the age and other qualities of the mules at the time of the sale; but these were both questions of fact for the jury, and inasmuch as they were both submitted as such, under instructions which were not objectionable to the plaintiff, and which fairly state the law applicable thereto, we are not at liberty to interfere with the finding of the jury on a simple question of fact, if there is any evidence in the record reasonably tending to support the same, and in this case there is evidence sufficient under the foregoing rule to sustain the verdict, and these specifications of error must therefore fail.

It is also charged that the court erred in giving instruction No. 10, fixing the measure of damages. This instruction, standing alone, would be an erroneous statement of the law, but, taken in connection with instruction No. 11, immediately following, it states the law applicable to the facts of this case, and is therefore not open to the criticism lodged against it. The court properly instructed the jury that the damages to which plaintiff would be entitled, if any, as against the bank, were the usable value of the mules during the time they were wrongfully detained. There is evidence in the record to show that the usable value of the team from the time it was taken in October, 1909, up to date of trial on February, 1911, nearly sixteen months, was \$1 per day. This is in no wise disputed or contradicted. The jury gave only \$100 damages; under the evidence a verdict for three times that amount would stand.

We can see no error in the record justifying interference by this court, and the judgment should therefore be affirmed.

By the Court: It is so ordered.

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FIRST STATE BANK OF MANNSVILLE v. LAWSON
et al.

No. 2824. Opinion Filed August 6, 1913.

Rehearing Denied December 23, 1913.

(137 Pac. 661.)

Error from County Court, Marshall County;
J. W. Falkner, Judge.

Action in replevin by the First State Bank of Mannsville against A. P. Lawson and others to recover possession of personal property for the purpose of foreclosing a chattel mortgage thereon. Judgment for defendants, and plaintiff brings error. Affirmed.

E. D. Slough, for plaintiff in error.

Chas. A. Coakley, F. E. Kennamer, E. S. Hurt, and Geo. S. March, for defendants in error.

Opinion by ROBERTSON, C. This case involves the consideration of the identical question decided by this court in *First State Bank of Mannsville v. Howell et al.*, ante, 137 Pac. 657. The opinion in that case is conclusive as to the issues herein, and we hereby adopt and promulgate that opinion as and for the opinion in this case.

For the reasons assigned, the judgment of the county court of Marshall county should be affirmed.

By the Court: It is so ordered.

CITY OF SHAWNEE v. CHEEK.

No. 2841. Opinion Filed December 23, 1913.

(137 Pac. 724.)

1. **NEGLIGENCE—Landowner—Duty to Trespasser.** A landowner owes a trespasser a duty, in respect to safety from dangerous artificial condition of premises, not to injure him intentionally or wantonly.
2. **MUNICIPAL CORPORATIONS — Negligence — Dangerous Premises—Actionable Negligence—Matters Considered—“Wantonness.”** A mere omission, although superficially characterized by mere thoughtlessness or heedlessness, but, in its deeper explanation, involving a reckless disregard for the safety of merely technical and reasonably anticipated trespassers, such as children of tender years, especially if unconscious trespassers, in respect to obviously and seriously dangerous artificial condition of premises, may amount to wantonness in a landowner; but the attractiveness and accessibility of the place or thing involving such danger and the probability of such trespassers, the gravity of the danger in such condition, the length of time such condition has existed, the smallness of cost and of deprivation of beneficial use involved in eliminating same, and the reasonableness of the inference that the landowner, as a person of ordinary sensibilities and prudence, knew or should have known of, and under all the facts and circumstances in the case should have eliminated such danger, are proper considerations in determining whether there was such reckless disregard for the safety of such trespassers.
3. **DEATH—Negligence—Contributory Negligence—Infant Trespasser.** A child under seven years of age, or in the absence of evidence of capacity, between seven and fourteen years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises, and the character of the trespass may be a circumstance to be considered by the jury in ascertaining whether there is contributory negligence.
4. **SAME—Right of Action—Nature of Right.** Section 4313, St. Okla. 1893 (section 5281, Rev. Laws 1910), does not operate as a continuance of any right of action which the injured person would have had but for his death, but confers upon the beneficiary thereof a property right in the pecuniary value to him of the life of his decedent, and gives him a new or independent cause of action for the pecuniary loss he has sustained by reason of such death.
5. **SAME—Survival.** A cause of action arising under section 4313, St. Okla. 1893 (section 5281, Rev. Laws 1910), has the quality

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of survivability, is not extinguished by the death of the beneficiary therein, and may be revived and prosecuted in the name of his administratrix.

6. **MUNICIPAL CORPORATIONS—Dangerous Premises—Injury to Trespasser—Petition—Sufficiency.** A petition which does not allege facts from which a reckless disregard for the safety of reasonably anticipated technical, if not unconscious, trespassers, amounting to wantonness appears as a legal conclusion, nor the ultimate fact of reckless disregard for the safety of such trespassers amounting to wantonness, is not sufficient, as against a demurrer, to warrant a recovery of damages for death resulting to such trespasser from dangerous artificial condition of defendant's premises.

(Syllabus by Thacker, C.)

*Error from District Court, Pottawatomie County;
Chas. B. Wilson, Jr., Judge.*

Action by Fannie W. Cheek, administratrix, against the City of Shawnee. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. E. Hood, City Atty., *W. M. Engart*, Asst. City Atty., and *W. T. Williams*, for plaintiff in error.

Blakency & Maxey, for defendant in error.

Opinion by THACKER, C. The plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

About May 24, 1908, defendant owned and possessed, within its corporate limits, a brick pumphouse, with three rooms, in one of which there was a pump pit about eleven feet deep, and covering practically the entire floor space of the room, except a walk way about ten feet wide on one side. This pumphouse was on an unbuilt-up and little used portion of a public street within the corporate limits of defendant, and was in a valley about 75 or 100 yards, according to one witness, or 350 or 440 yards, according to other witnesses, south from the south end of the built-up and more traveled portion of this street, which built-up and more traveled portion of the street extends downward, and ends on the south side of a hill north of the valley. About 75 or 80 yards south of the pumphouse was the channel of the North Canadian

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river, with which the pumphouse pit was connected by a pipe. About 200 yards from the pumphouse was a race track, and within 60 or 70 feet of the pumphouse were the stables connected, in use or purpose, with the race track. The defendant had used the pumphouse in connection with its system of waterworks; but three or four years before the date mentioned had taken its pump and pumping equipment away from the pit and building, and had abandoned use of the same because of the flooding of the pump pit through its said pipe connection on the occasion of a rise in the river. The pipe from the river entered the pump pit about twelve or eighteen inches above its bottom, which it appears was above the ordinary level of the water in the river; but plaintiff, in her testimony, mentioned three occasions on which the pump pit had been flooded by rises from the river. After defendant abandoned the pumphouse, it was, with the knowledge and consent of a member of defendant's council, occasionally used by parties having animals in the race track stables for storage of hay; but on May 24, 1908, when, as a result of a rise in the river commencing about two days before, there was about nine feet of water in the pump pit, there was no hay in the pumphouse except a remnant scattered about over the floor and on the surface of the water, which hay on the water had been raised, by the rising of the water, from the bottom of the pump pit. The defendant had made no other use of the premises for three or four years. The glass, if not the sash, had disappeared from the windows, the doors had fallen into a dilapidated condition, both doors and windows were open, and such had been the condition during the greater portion of the time of defendant's abandonment of its use of the pumphouse. James Cheek, the original plaintiff, and Fannie W. Cheek, in whose name, as administratrix, the action was revived, on May 24, 1908, resided with their family, outside of defendant's corporate limits, about 150 yards from the pumphouse, and their children, as well as other children in that vicinity, played about the pumphouse during the time of its abandonment. The plaintiff's children also hunted eggs in the hay in the pumphouse; but plaintiff forbade her children playing about the same. The evidence does not show that defendant had ac-

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tual knowledge of such use of its premises by children, nor actual knowledge of the coat of hay on the surface of the water, nor of the depth or fact of water in the pump pit at the time of the accident. On May 24, 1908, the original plaintiff, with Thompkins Cheek, the nine-year-old son of the two successive plaintiffs, and an older son, had occasion to be, and were, near the pumphouse; but the father and older boy went a short distance away in a boat, leaving Thompkins Cheek to watch some hogs near the pumphouse, and, when the father and older boy, soon after, returned, Thompkins Cheek could not be found. In the afternoon of the same day the body of Thompkins Cheek was found drowned on the bottom of the pump pit. At that time the surface of the water in the pit was practically covered with hay that was dry on top, although at places the hay was very thin in its covering, and, by close observation, the water could not only be seen through the hay at places, but there were open spaces from the size of a man's hand to a foot or more square where the same could be seen. It appears inferentially that Thompkins Cheek, for some unknown purpose, although probably to gratify an instinctive curiosity or desire to re-explore the silent chambers of the deserted building, and possibly lounge upon the hay he thought to find therein, or to search for hens' nests, or to gratify some other boyish impulse, had entered the pumphouse through an open door, had stepped upon the dry hay, apparently, to his view, covering the surface of the water in the pit, without knowledge of there being water in the same, and, the surface of the water being about two feet below the top of the pit, had been unable to extricate himself. The evidence shows he had been an industrious boy, and helped his parents, not only by work in the field, but by doing chores about the house, and his father, who died about ten months later, was 61 years of age when he was drowned.

This action was begun by petition filed August 6, 1908; but no trial was had until November 11, 1911, when a verdict for \$2,000 was returned for plaintiff.

The case presents the vexed question of the liability of a landowner for personal injuries and death resulting from a child

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trespasser's contact with a dangerous condition of the premises.

In 1841 Lord Denman, C. J., in *Lynch v. Naudain*, 1 Q. B. 29, sustained a verdict for an injury upon a plaintiff, under seven years of age, who, with several other children, were playing with defendant's horse and cart in a public street, where same had been left unattended for half an hour, when another boy, by leading, caused the horse to move, and plaintiff, falling from the shaft, was run over by a wheel of the cart, and suffered a fractured leg.

That appears to be the first case in which an owner of property, without actual intent to injure, or actually setting in motion a force, or setting a trap, from which injury resulted, had been held liable for personal injuries caused by trespasser's contact with a dangerous condition of his property, not aside from and so near a public highway as to be dangerous to travelers getting off the same, although other cases are there cited as if supporting the conclusions there reached.

It appears that there was no extended discussion of the doctrine announced in that case until after the decision of the Turntable case (*Stout v. City & P. R. Co.*, Fed. Cas. 13,504, affirmed in 17 Wall. 657, 21 L. Ed. 745) in 1873; but, with the great volume of litigation involving the same that has followed, a war of conflicting ideas has since raged with unabated vigor about this doctrine. The doctrine, apparently without good reason, is known as the "attractive nuisance" doctrine.

The cases sustaining the doctrine, or allowing a recovery, have not only based their conclusions in some instances upon somewhat different grounds, but are not agreed as to the limitations which should be placed upon the doctrine, and this has been urged by some of the critics as evidence of lack of solidity in any ground whatever for the doctrine.

In answer to the argument that the special attractiveness of the thing or place was an implied or constructive invitation to children, it has been said that the condition or use of land by its owner is not intended as such invitation, that the distinction between invitation and temptation is ignored by such argument, that there are but few things or places not attractive to children, and that it is difficult, if not impossible, to find and mark out, so

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that landowners may be able to see and know, the boundary line between the things or places that are and the things and places that are not so attractive as to constitute such invitation and render them liable for injuries to trespassing children coming in contact with such things or places; but the duty to use ordinary care for the safety for one by invitation upon the premises is indisputable, and most of the cases in which there is any attempt to find the principle upon which recovery is allowed do so on that of such invitation.

In answer to the argument that the landowner may be held liable upon the ground of an implied intent to injure, it has been said that it is absurd to imply such intent where it is clear that it does not in fact exist; but, of course, the duty and the liability for negligence in a breach of the duty to abstain from intentionally injuring even a trespasser, unless in the lawful exercise of the right of defense or expulsion, is indisputable.

In answer to the argument that the maxim of "*sic utere tuo ut alienum non laedas*" (which, literally translated, means, "enjoy your own property in such a manner as to not injure that of another person") requires the landowner to exercise care to make his premises so safe as to avoid injury to trespassing children who may come in contact with a dangerous condition of the same, it has been said that the true legal meaning of this maxim is, "so use your own property as not to injure the rights of another," and that, as a trespasser has no right to be upon the landowner's premises, this maxim is inapplicable, and, although we express no opinion on this point, in *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871, 8 Ann. Cas. 862, the court said there might be more, but there was one conclusive answer to this argument, in that the maxim referred only to acts of the landowner, the effect of which extended beyond the limits of his property.

In the well-considered case of *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A, 1026, decided March 8, 1911, the doctrine is condemned, and that court's conception of the status and tendency of judicial opinion,

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both in England and this country, on the subject seems worthy of statement here, and appears in the following extract from the opinion :

"As said by (now) Mr. Justice Lurton, in *Folton v. Aubrey*, 74 Fed. 350, 43 U. S. App. 278, 20 C. C. A. 436. 'It seems to us that many of the American cases which we have cited fail to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises and those who come to harm by reason of the subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises and who he was bound to anticipate might avail themselves of his license. This seems to be sharply emphasized in the case of *Corby v. Hill* (4 C. B. N. S. 556, 93 E. C. L. 556), and is a distinction which should not be overlooked. * * *' Some uncertainty, however, seems to have existed in England as to the standing of the case, and much inconsistency appears in the English cases since decided (a review of which is found in *Friedman v. Snare, etc., Co.*, 71 N. J. Law, 605, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, 2 Ann. Cas. 497); but all doubt is now set at rest by the recent case of *Cooke v. Midland G. W. R. Co.* [1909] A. C. 229, 5 Ann. Cas. 557, wherein the Lynch case is expressly approved, and its doctrine applied to a turntable case. * * * Notwithstanding the unstable foundation upon which the Stout case stands, it was expressly approved and adhered to in *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 434, 14 Sup. Ct. 619, 38 L. Ed. 434, and must, doubtless, be accepted as the law of that court. * * * It must be admitted that a majority of the cases adopt the rule of the Stout case. The list includes *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584, 31 South. 561; *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; *Ferguson v. Columbus, etc., R. Co.*, 77 Ga. 102; *Chicago, etc., R. Co. v. Fox*, 38 Ind. App. 268, 70 N. E. 81; *Edgington v. Burlington, etc., R. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Brown v. Chesapeake, etc., R. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717; *Keffe v. Milwaukee, etc., R. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Chicago, etc., R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920; *Bridger v. Asheville, etc., R. Co.*, 25 S. C. 24; *Ihwaco, R., etc., Co. v. Headrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; *Ft. Worth, etc., R. Co. v. Robertson* (Tex.) 16 S. W. 1093, 14 L. R. A. 781.

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On the other hand, the rule is utterly rejected in *Wilmot v. McPadden*, 79 Conn. 367, 65 Atl. 157, 19 L. R. A. (N. S.) 1101; *Daniels v. New York, etc., R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481; *Frost v. Eastern R. Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Delaware, etc., R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; *Walsh v. Fitchburgh R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; *Wheeling, etc., R. Co. v. Harvey*, 77 Ohio St. 235, 83 N. E. 66, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503, 11 Ann. Cas. 981; *Thompson v. Baltimore, etc., R. Co.*, 218 Pa. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897, 11 Ann. Cas. 894; *Paolino v. McKendall*, 24 R. I. 432, 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736; *Walker v. Poto-mac, etc., R. Co.*, 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871 [8 Ann. Cas. 862]; *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148. That there is a strong tendency to limit rather than extend the doctrine is admitted on all sides. This tendency is sufficiently shown by the following cases from the states wherein the turntable doctrine is approved: [*Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398] 39 S. E. 82, 54 L. R. A. 314, which was the case of a five year old boy drowned in a pool formed in an excavation on the premises of the plaintiff in error; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, which was the case of a boy, not quite five years old, drowned in a quarry hole on the defendant's premises; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543, which was the case of a nine year old boy drowned in a quarry hole; *Dobbins v. Missouri, etc., R. Co.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, which was the case of a three year old child drowned in a pool of water on defendant's right of way; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, which was the case of a ten year old boy drowned in a pond allowed to form on the defendant's premises; *Mayfield Water, etc., Co. v. Webb*, 129 Ky. 395, 111 S. W. 712, 18 L. R. A. (N. S.) 179, 130 Am. St. Rep. 469, which was the case of an eleven year old boy killed while playing on a telephone guy wire; *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847, which was the case of a child of tender years injured while playing with a revolving door; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106, which was the case of an eleven year old boy drowned in a pond of surface water which

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was allowed to stand on defendant's lot. Other cases like *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004; *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Indianapolis Water Co. v. Harold* (Ind. App.) 79 N. E. 542; and *Price v. Atchison Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625—with much more consistency, apply the doctrine to the cases of open conduits, ditches, and water holes, and hold the landowner liable."

It appears that Illinois (see *St. Louis, etc., R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269, and *Pekin v. McMahon, supra*) and Tennessee (see *East Tenn. etc., Ry. Co. v. Cargille*, 105 Tenn. 628, 59 S. W. 141, and *Bates v. Nashville, etc., R. Co.*, 90 Tenn. 36, 15 S. W. 1069, 25 Am. St. Rep. 665) should also be included in the first foregoing enumeration of states favoring the doctrine.

In *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884, the court said that the doctrine of the turntable cases shifted the duty of watchfulness and care from the shoulders of parents, where the Creator had placed it, to the shoulders of the landowners using their property to make a living, and thus materially detracted from the full ownership of property, sacred under the Constitution; but we only refer to that statement as an extreme view.

In *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, the doctrine is also condemned, and the court, in criticism, referred to an application thereof in a Kansas case, and said:

"Here we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawnmower, or a spade upon his lawn, a rake, with its sharp teeth pointed upward, upon the ground, or leaning against the fence, a bed of mortar prepared for use in his new house, a wagon in his barnyard, upon which children may climb, and from which they may fall, or who turns in his lot a kicking horse or cow with calf, does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest twelve year old boys get in and be hurt by the animals, or by climbing into the

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haymow, and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond upon his land? Such is the evolution of the law less than 30 years after the decision of *Railroad Co. v. Stout*, 17 Wall. 657 [21 L. Ed. 745], when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon."

In the same case it is further said in the opinion:

"That a landowner is under no obligation to use care to protect a trespasser is a broad, and, until recently, undisputed, rule, without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained today by the great weight of authority. It is contended by some lawwriters, and has been held in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan v. Attorton*, L. R. 1 Exch. 239, that a four year old boy was a trespasser, under the circumstances of that case, and there are numerous cases cited in this opinion where liability is denied upon that, and no other, ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that, in cases involving turntables, a majority of the cases, which are necessarily few, have followed the case of *Railroad Co. v. Stout*, 17 Wall. 657 [21 L. Ed. 745], but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen."

In the case of *Wheeling L. E. Co. v. Harvey*, *supra*, decided in 1907, where much of the case law upon the doctrine is very ably reviewed, and the doctrine condemned by the Ohio court,

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in speaking of the opinion of Judge Hooker in *Ryan v. Towar*, *supra*, it is said:

"Of the case of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, in which the opinion is by Judge Cooley, and which is quoted from at some length in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, as approving the turntable doctrine, he says: 'Clearly this does not adopt the rule of *Sioux City & P. R. Co. v. Stout*.'"

In *Powers v. Harlow*, *supra*, Judge Cooley said: "A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible"—and, although it is not expressly so stated in the opinion, the act for which a recovery was there allowed appears to have been wanton in its reckless indifference to the safety of others.

In the case of *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148, the court, in speaking of the original turntable case, said:

"[It] if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unblocked, as turntables often are, on its own track—a necessary appliance in lawful business! Ought a farmer to be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and the farmer is sued on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. Now many things are, or may be, so to children? 'A child's will is the wind's will.' Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, the canal, the railroad cars, the moving carriage in the street,

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electric works, and infinite other things attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him?"

The authorities are, we believe, agreed that a landowner is in duty bound to abstain from intentionally harming a trespasser, unless in the lawful exercise of the right of defense or expulsion, and, in a very able, if not entirely satisfactory, criticism of the doctrine, to which there has been complimentary reference by several courts, Judge Jeremiah Smith, in an article published in 11 Harvard Law Review, 349, says:

"He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to endanger any such person if within reach. But the alleged duty, if admitted, is material only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser."

In the Smith article, *supra*, it is further said:

"Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favor of either view. A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is policy, *i. e.*, expediency, in the Benthamic sense of 'the greatest good to the greatest number,' 'and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed.' On the one hand, it is the policy of the law to establish rules tending to preserve life, and to protect human beings from serious bodily harm. And this laudable purpose seems frustrated, *pro tanto*, by permitting a landowner to pursue with impunity a mode of user which he knows, or ought to know, is likely to occasionally result in the suffering of great harm on the part of some of his neighbor's children. The fact that

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a defendant neither desired nor intended to bring about a particular result does not necessarily exonerate him. The law not unfrequently holds defendants liable irrespective of their intention to do harm, and in some extreme cases may even hold them liable irrespective of the utmost care on their part, practically making them insurers against all harm resulting from certain classes of acts. 'When a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification.' And this doctrine may be assumed to apply, even though he had no notice that his act was likely to cause damage to a specific person at a particular moment, but knew only that it was likely to cause damage to some unspecified person at some indefinite time. To escape liability, he must show that there are considerations equal or paramount to those urged in behalf of the plaintiff which justify his conduct notwithstanding the known risk of damage to others therefrom. He must sustain 'a claim of privilege.' On the other hand, the defendant justifies under his right or privilege to make a beneficial use of his own land in methods which will do no harm to persons remaining outside his boundary. The beneficial use of land is a primal necessity, not only to those individual landowners who happen to be defendants in lawsuits, but to the entire human race. 'The business of life must go forward, and the fruits of industry must be protected.' 'It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way, and this in such a manner that their tendency cannot be remedied by any means short of not acting at all. * * * To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered.' Like reasons apply to a man's use of his own land in the common way of husbandry, or otherwise for ordinary and lawful purposes.' It is true that the right of user is never literally absolute, and is always restricted to some extent 'by rights residing in others, and by duties incumbent on the owner.' But it is also true that every restriction diminishes *pro tanto* the beneficial character of the use, and hence the law imposes restrictions as seldom as possible, and never except upon the strongest grounds. If an opposite policy were pursued, it is easily conceivable that the improvement and beneficial occupation of land might become in fact impossible, and property in the soil for nearly all useful purposes might be annihilated. To say, for in-

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stance, that B must keep his land in safe condition to be trespassed upon would often result in practically depriving B of certain modes of beneficial enjoyment, unless he takes precautions which are incompatible with profitable user, and might in effect amount to confiscation of his land for the benefit of trespassers. The difficulty of restricting the owner without practically destroying his interest is fully recognized by the law. It has been an important factor in inducing courts to refuse to impose restrictions in various instances where the case in behalf of the landowner is not so strong as in the matter now under consideration. We refer to the class of cases where the use of land, instead of harming only those persons who come upon the land, exerts a damaging influence upon persons and property situated beyond the border of the defendant's land. While there are, of course, many acts thus harmfully operating beyond the limits of his land for which an owner is held liable, there are also various acts of user which confessedly have a damaging effect upon persons and things outside the boundary of the land, and which, nevertheless, the law does not prohibit or punish. * * * The courts do not consider it for the interests of the community that the landowner who does not go beyond certain common and generally beneficial acts of user should be called upon to answer for damage thereby done, even where the thing damaged is outside the limits of his land."

Judge Thompson, in his *Law of Negligence*, vol. 1, sec. 1031, said:

"In respect of the * * * cases * * * of attractive nuisances, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it, and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed, or maimed for life. In view of what has preceded, the author regrets that he cannot say, as he said in his first edition, that such is not the law. He limits himself to expressing the opinion that it ought [not] to be the law, and to citing with commendation the few decisions which hold that it is [not] the law. Nevertheless, a few decisions of enlightened and humane courts are found more or less tending to the conclusion that the owner of any machine or other thing which, from its na-

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ture, is especially attractive to children, who are likely to attempt to play with it in obedience to their childish instincts, and yet which is especially dangerous to them, is under the duty of exercising reasonable care to the end of keeping it fastened, guarded, or protected so as to prevent them from injuring themselves while playing or coming in contact with it."

In *Shearman & Redfield on the Law of Negligence*, sec. 98, it is said:

"The overwhelming weight of authority, both in number of decisions and in soundness of reasoning, by which is established the right of little children to recover for injuries suffered while trespassing, should alone be sufficient to settle this question. Innocence and mistake are no excuse for a trespass, and therefore one committed by a child is just as truly a trespass as if committed by an adult. The owner of premises has precisely the same right to eject a child therefrom as he has to eject a full-grown man. He has the same right to recover nominal damages in each case. But, when he is sued for damages caused by his negligence towards a trespasser, he finds that there is a wonderful difference between the probable result of the suit if the plaintiff is a child, and the probable result of a like suit by an adult. Is there any intelligible ground of distinction to account for this difference, except that the child is presumably not guilty of conscious negligence, while the man presumably is? When the man proves that he was ignorant of the fact that he was trespassing, or shows that his trespass was only technical, and such as he might reasonably suppose would not be objected to by the defendant, and did not in fact produce any appreciable injury or annoyance, his right to recover is just as good as that of an infant. All this is well settled. And what inference can possibly be drawn from such decisions, if not that the plaintiff's trespass is only a circumstance tending to prove contributory fault upon his part, and not in and of itself such fault or attended with the usual effects of such fault?"

In *Whittaker's Smith on Negligence*, sec. 77, it is stated, in the editorial notes, that the rule that a licensee or trespasser ordinarily enters land at his own risk is subject to an exception where the danger is exposed, and such as might be reasonably apprehended, and, in the text, at page 513, in discussing contributory negligence of children, it is said:

"The doctrine of contributory negligence is applied to children, and to those having the control of them. In one case, Chan-

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nell, B., at *nisi prius* is reported to have said: "The doctrine of contributory negligence does not apply to an infant of tender age." This rule is scarcely satisfactory, because it is difficult to say what is or is not a tender age; but a better rule which would probably excuse the negligence of a child of tender age is that a child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising."

In *Id.* 66, it is said:

"If A. digs a hole in his land, and B., who has a right to personal security (but no right to be on the land) falls into it, A.'s right is paramount to B.'s, and no question of negligence arises; but, if A. had permitted B. to come upon his land, the rights would be equal, and questions of negligence would arise, viz.: Whether the pit was negligently left unguarded, and whether B. was using his right of being there with care."

And in *Id.* 79-81, it is said:

"But such owner will be liable for anything in the nature of a trap upon the premises, known to him, and as to which he gives no warning to the licensee. He must not do anything to alter the premises, so as to be likely to cause injury, without notice to the licensee. Upon the whole I incline to think, with Mr. Campbell, that the owner is bound to take ordinary care with respect to a bare licensee. The question is, as I think, one of great difficulty. It is said that the licensee, being there merely for his own advantage, can only demand that slight care which a gratuitous bailee is bound to display, and so far the proposition is correct; but I am not sure, if a gratuitous bailee were to indicate a place of deposit, whether he would not be undertaking that that particular place was reasonably fit for the deposit, and, if so, a similar agreement would apply to an owner who gives leave to come upon his property, viz.: That he has undertaken that his property is in some degree fit for the licensee to use. If this be so, it seems that he ought to take ordinary care. The courts, however, have distinctly held that the owner is only liable for 'gross' negligence, because he is in the same position as a gratuitous bailee; but I am inclined to think the assumption is not accurate. I think that the question is only further obscured by insisting that the owner must be guilty of an act of commission to render him liable to the licensee. It may be very frequently the case that omissions are slighter neglects than acts of commission; but they may very well be the contrary, and sometimes are so. If the neglect be of a grave and obvious character,

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it would matter nothing whether it was an omission or commission. For instance, it would matter nothing whether a signalman omitted by grave and obvious negligence to pull the handle to direct an express upon its proper line, or whether he negligently pulled the wrong handle. Where there is something done by the owner which is in the nature of a * * * wanton injury, he will be liable to an action for negligence even by a trespasser, as if an owner of premises with great recklessness shot a trespasser, or if the owner set spring guns upon his premises and injure a trespasser. But where a trespasser took shelter from a storm in a ruinous house not fenced off from the road, and a wall fell upon him and injured him, it was held that he could not recover. Upon this principle it has been held that, where an owner or occupier of lands makes an excavation upon his land so near to a public highway as to be dangerous under ordinary circumstances to persons passing by, it is his duty to take reasonable care to guard such excavation, and he is liable for injuries caused, even if such persons are consciously or unconsciously straying from the way. Where the excavation is at a considerable distance, no such care need be taken. What is a considerable distance, it is impossible to say, and, in truth, each case depends upon its own facts."

We agree with the view of this author that the landowner is bound to take ordinary care with respect to a bare licensee; but we do so upon the assumption that he uses the expression "ordinary care" as meaning such care as a person of ordinary prudence would usually exercise under the facts and circumstances in such case, although such care be slight in comparison with the care such person would usually exercise about their own affairs of more than slight importance, and, indeed, sections 2689 and 2691, St. Okla. 1890 (sections 2917 and 2919, Rev. Laws 1910), make it clear that the degrees of care (section 2688, St. Okla. 1890, same being section 2916, Rev. Laws 1910) and the degrees of negligence (section 2690, St. Okla. 1890, same being section 2918, Rev. Laws 1910) refer to the differences in the degrees such persons usually exercise in their own affairs of different degrees of importance, and not to any difference in degrees of care in the same case or under the same state of facts—the rule of three such degrees being thus not inconsistent with the rule that the measure of duty and test of negligence and lia-

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bility is that one degree of care which a person of ordinary prudence would usually exercise under the facts and circumstances of the particular case.

We also agree with the view of this author that, although not usually so, an omission may constitute a greater neglect of duty than an act of commission, so that the rule holding a land owner liable for acts of commission, and not liable for mere omissions resulting in harm to a bare licensee, is not sound, and is indefensible, and that, "where there is something done" (and we would add, "or omitted") "by the landowner which is in the nature of * * * a wanton injury, he will be liable to an action for injury even to a trespasser." In our opinion what omission or act of commission, free from intent to injure, will amount to wantonness and render the landowner liable to a trespasser must depend upon the facts and circumstances of each case. The character of the danger and the position of the landowner in respect to his actual knowledge or thoughtlessness of the dangerous condition of his premises, and of its attractiveness and accessibility to merely technical trespassers, especially such as children of tender age, as well as of every other fact and circumstance bearing upon the probability of such trespasses and the probability of injury to trespassers from contact with such dangerous condition, together with the smallness of the expense or effort required to eliminate such danger, bear upon the question of wantonness, and it is not difficult to conceive of a great variety of instances in which a landowner, indifferent and thoughtless of the safety of other persons, might, without intent to injure, be guilty of unquestionable wantonness.

There appears to be no denial of the doctrine of liability to injured trespassers for wanton acts of a landowner; but a great many of the cases, with which we are unable to agree, in effect, limit such liability to acts of commission, thus holding, in effect, that there can be no wantonness in an omission, or, if so, that it creates no liability to a trespasser, even though the trespass be merely technical and even unconscious. It is no doubt true that wantonness should not be inferred from the mere omission to make safe a dangerous place upon one's premises in the absence

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of sufficient evidence to show a reckless disregard for the life, limb, body, or health of another or others; but, if wantonness be proven, we are of opinion that it is immaterial whether it consists of an act of commission or a mere omission.

A principle that appears to be deducible from much of the case law on the subject allowing recovery is that it is not only the duty of a landowner to a trespasser to not injure him intentionally or wantonly, but that an act or omission involving a reckless indifference to the safety of reasonably anticipated technical trespassers, such as children of tender years, although without intent to injure, may be wanton. It is undoubtedly the general rule that a landowner does not owe a trespasser any further or greater duty than this; but his duty to an invited person upon his premises is quite different, and requires of him reasonable care for the safety of such person.

As used in this opinion, the words "wanton," "wantonly," and "wantonness" mean and are applicable to acts or omissions of a landowner involving reckless disregard for the safety of such, if any, merely technical trespassers as should in reason have been anticipated by a person of ordinary prudence, and such acts or omissions may be "wanton," "wantonly" done, or the result of "wantonness," although merely thoughtless or heedless in their superficial character, and free from intent to injure.

As stated in Book 1 (Lewis' Ed.) Blackstone's Commentaries, p. 117:

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health," etc.

In view of the great value and vital importance of this right and the well-known disposition and lack of self-control in children, we see no sufficient reason why a landowner should not, at least, be deemed in duty bound to make reasonably safe any obviously dangerous, artificial, and attractive condition on his premises, which in character is clearly different from common and well-known dangerous natural conditions, especially when he is able to do so at little or no cost, and without appreciable impairment of his beneficial use of the same in all cases in which his

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failure to do so involves reckless disregard for the safety of children of tender years, especially children under seven years of age, or, in the absence of evidence of capacity to be guilty of contributory negligence, under fourteen years of age, as a person of ordinary prudence must anticipate will probably be attracted to and may come in contact with and be injured by such dangerous conditions. Is it anything less than wantonness for a landowner, with actual knowledge of such dangerous, artificial, and attractive conditions of his premises, and of facts from which, as a reasonably thoughtful person, he must know that merely technical, if not unconscious, trespassers in the persons of children living or accustomed to congregate or be near by may come in contact with and be seriously injured by such dangerous conditions, to abstain from removing the danger of such conditions, especially if he is able to do so at little or no cost, and without appreciable impairment of his beneficial use of the premises?

It may be that parents, by proper example and correctly enforced precepts, can greatly reduce the number of injuries resulting from the trespassing children and their contact with the dangerous condition of the premises upon which such trespasses are made, especially if the parents have correct and positive convictions, with which the child may be indoctrinated in many ways; but the senses of sight, taste, hearing, touch, and smell in children of tender years are particularly eager for gratification, and their instinctive desire to examine and explore, to them, strange, mysterious, and wonderful things and places, generally accentuated by much surplus energy, is often stronger than the influence of even the best and highest degree of parental effort to instruct and restrain.

These are matters of common knowledge, and the moral duty of landowners to supplement the duty of parents in respect to trespassing by children should certainly become a legal one. when, under all the facts and circumstances in the case, a failure to do so amounts to wantonness, *i. e.*, a reckless disregard or heedlessness for their safety.

The greater and farther removed from the natural and common in character the danger, and the greater the probability of

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contact therewith and injury therefrom by persons, especially children of tender years, who are merely technical, if not unconscious, trespassers, and the smaller the expense and inconvenience of eliminating the danger, the clearer appears to be the wantonness.

In the light of the known danger in turntables, high explosives, electric currents, and the like, and the disposition of children, was the act or omission of the landowner in most, if not all, the cases in which recovery for injuries to children has been allowed to stand anything less than wantonness? We think there is, at least, evidence reasonably tending to prove wantonness in most of them.

The walls and spaces of a deserted building such as this, where children may play hide and seek, and hunt hens' nests, as the evidence shows they did do about this building, and otherwise gratify their childish instincts, are undoubtedly exceptionally attractive places to children, and an intrusion by children of the age of the deceased child should be presumed, in the absence of evidence to the contrary, to be not merely a technical but an unconscious trespass.

In *C., R. I. & P. Ry. Co. v. Baroni*, 32 Okla. 340, 122 Pac. 926, it was held proper to submit to the jury the question of contributory negligence, permitting the jury to take into consideration the age, experience, and maturity of the child, and the general rule appears to be that a child under seven years of age is incapable as a matter of law, and one between the age of seven and fourteen may or may not be capable of contributory negligence, depending upon the age, experience, and capacity to understand, to appreciate, and avoid the danger to which the child is exposed under all circumstances of the case, the care required being the same care that a person of the same age, education, and mental and physical capacity uses under like circumstances, and the contributory negligence of such child is usually held to be a question for the jury. See notes to *Schoonover v. Baltimore, etc., R. Co.*, Ann. Cas. 1913B, 969; 1 Ann. Cas. 895; 17 Ann. Cas. 353, 14 Am. St. Rep. 590; 49 Am. St. Rep. 408.

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In deference to the fact that this is the first time the doctrine of the "turntable cases" has been presented for the consideration of this court, we have quoted quite extensively from authorities touching and illustrating some of the varient views upon the same; but, in respect to such quotations, we do not desire to be understood as approving or disapproving further than expressly shown in this opinion.

In the brief for defendant it is urged that it was not in duty bound to keep its unused pump station securely locked and barred from the entrance of children, and that the doctrine of the so-called "turntable" cases is not sound; but the question of wantonness as a ground for recovery is not discussed.

We deem it unnecessary to more specifically point out the logical sequence of the foregoing views touching any question presented by defendant, in view of the necessity of a reversal of this case upon a distinct ground hereinafter shown, except that it appears that the demurrer to the petition should have been sustained, in view of the fact that the allegations do not show a reckless disregard for the safety of such technical trespassers as the deceased boy, and wantonness is not expressly nor by necessary implication alleged.

It is true that the petition alleges facts from which wantonness might be inferred, if the court was at liberty to indulge such inference in favor of the pleader; but, "in the construction of a pleading, challenged by a demurrer before trial, nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case warrant." *Atwood v. Rose*, 32 Okla. 355, 122 Pac. 929.

It is urged by the defendant that the right of action for the death of Thompkins Cheek was personal to and expired with the original plaintiff, the father of the decedent; that it was not susceptible of revivor for the reason that it did not exist after the death of the original plaintiff.

Section 4312, St. Okla. 1893 (section 5280, Rev. Laws 1910), reads:

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“No action pending in any court shall abate by the death of either or both of the parties, thereto. * * *

But we do not understand this section to impart the quality of survivability to causes of action which do not have that quality under the next preceding section (section 4311, St. Okla. 1893, same being section 5279, Rev. Laws 1910), which reads:

“In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.”

These sections of our statute were adopted from Kansas, and, in two cases decided by the courts of that state, before such adoption, language is used which gives some color to the contention that an action for pecuniary loss resulting from death wrongfully caused under section 4313, St. Okla. 1893 (section 5281, Rev. Laws 1910), is not within any provision of section 4311, *supra*; but due examination of these cases will show that this precise question should be regarded as not settled thereby, and as still open.

In *A., T. & S. F. Ry. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683, the latest of those cases, where a person wrongfully injured commenced action, and, while same was pending, died from another and independent cause, the court held that his entire cause of action for the injury survived and did not abate under sections 4311 and 4312, *supra*; the *arguments* therein as to the nature of the cause of action given by section 4313, *supra*, being inapplicable.

In the *City of Eureka v. Merrifield et al.*, 53 Kan. 794, 37 Pac. 113, the other one of these cases, it is held that section 4311, *supra*, construed with sections 4312 and 4313, *supra*, “only permits actions to survive *for injury to the person* when death does not result from the injury”; but, in that case, the only question was as to the sufficiency of the petition of the parents, as next of kin, suing for their own pecuniary loss sustained by reason of the wrongfully caused death of their child, in the absence of any allegation that the child, at the time of such death, was a non-resident of the state, or that no administrator had been appointed

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for his estate. The action was for "death" under section 4313, *supra*, and section 4314, St. Okla. 1893 (section 5282, Rev. Laws 1910), and not for the personal injury for which he might have sued had he lived, the survivability of their cause of action was in no wise involved, the quoted holding of the court was apparently foreign to any question before it, and this language no doubt was merely intended to give expression to the indisputable view that the language "*or for injury to the person,*" used in section 4311, *supra*, does not impart the quality of survivability to the cause of action *for death* given by section 4313, *supra*; these two causes of action being separate and distinct.

Section 4311, *supra*, however, apparently stamps with the quality of survivability every cause of action which would survive at common law and every cause of action for injury to "personal estate," and, if the cause of action in this case survived the death of James Cheek, the original plaintiff, it must do so because section 4313, *supra*, does not give a right of action merely for a wrong to a domestic relation or to the person of the beneficiary, but stamps with the character of "estate" or property right the pecuniary interest of the father in the life of the child, at the time of the wrongfully caused death of the latter, which the former is allowed to recover.

Section 4313, *supra*, reads as follows:

"When the death of one is caused by the wrongful act or omission of another the personal representatives of the former, may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages * * * must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 4314, *supra*, reads as follows:

"In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by

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the widow, or where there is no widow, by the next of kin of such deceased."

The death for which this action was brought occurred prior to the amendment of section 6893 (6261) St. Okla. 1890, by Sess. Laws 1909, p. 548 (Comp. Laws 1909, sec. 8985), which went into effect June 10, 1909 (see section 8418, Rev. Laws 1910, for history of act), and, under the provisions of section 6893, *supra*, the father was the sole heir, and therefore the only "next of kin" of the deceased child.

Section 4067, St. Okla. 1890 (section 6586, Rev. Laws 1910), declares all things susceptible of ownership to be property within the meaning of the chapter relating to the nature of property, and section 4068, St. Okla. 1890 (section 6587, Rev. Laws 1910), includes among its specifications of what may be owned "rights created or granted by statute."

In *Michigan Central R. Co. v. Ireland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, an action founded upon the Employers' Liability Act of Congress of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), it is said:

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict. c. 93, known as Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England has been construed, not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain * * * members of the family for the deprivation, pecuniarily resulting to them from his wrongful death."

In the same case *Patterson*, Railway Accident Law, sec. 401, is approvingly quoted as stating that the term "pecuniary loss or damage" is judicially employed, in cases arising under such statutes, as follows:

"Not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is sus-

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ceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation."

The measure of damages recoverable under section 4313, *supra*, as held under similar statutes in other jurisdictions, is limited to the pecuniary loss sustained by the beneficiaries therein specified (*M., K. & T. Ry. Co. v. West*, 38 Okla. 581, 134 Pac. 655; *St. L. & S. F. R. Co. v. Long*, *ante*, 137 Pac. 1156; *M., K. & T. Ry. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383; and *K. P. Ry. Co. v. Cutter, as Administratrix, etc.*, 19 Kan. [2d Ed.] 83), and this tends to show that a species of estate, a property right, was conferred upon the father, as next of kin, by this statute.

A recent case holding that a right of action for death under the statutes of Illinois, which do not appear materially different from our own in this respect, accrues immediately upon death, becomes an asset of the estate of the beneficiary, and survives the death of the beneficiary, is that of *Union Steam Boat Co. v. Chaffin's Adm'rs et al.*, 204 Fed. 412, 122 C. C. A. 598, and in that case the case of *Pitkin v. N. Y. C. & H. R. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906, which is to the same effect, is cited and quoted.

In notes to *Gilkesson v. Missouri Pacific Ry. Co.*, 17 Ann. Cas. 763-776, several cases holding that the action does survive, as well as others holding that the action does not survive, are cited and reviewed, and the following excerpt from that note seems worthy of quotation here: .

"In other of the foregoing decisions adhering to the view that the action survives, the right of the beneficiary in the action has been considered a property right which is survivable, and passes to the representatives upon his death. In such cases this statute creating the cause of action is construed to create a new cause of action in favor of the beneficiaries for the damages sustained by them, and not as continuing the cause of action which the original deceased might have had if he had survived the injury. *Cooper v. Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633; *Meeke v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635; *Mundt v. Glokner*,

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24 App. Div. 110, 48 N. Y. Supp. 940, appeal dismissed 160 N. Y. 571, 55 N. E. 297; *Pitkin v. N. Y. Cent., etc., R. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906. In *Meekin v. Brooklyn Heights R. Co.* [164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635], *supra*, the court said: 'Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries; but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from and not a revivor of the cause of action, which, if he had survived, he would have had for his bodily injury.' In *Cooper v. Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633, the court said: 'The controlling feature in this legislation is that damages are made recoverable for causing death as compensation for the pecuniary injury the designated beneficiaries have sustained by reason of the death. If there be no widow or next of kin at the time of the death of the deceased, the pecuniary injury contemplated by the statute does not exist, and the action cannot be maintained. It is also clear that the pecuniary injury to be compensated for is that of the widow or persons who are next of kin at the time of the death of the deceased, and that the cause of action created by the statute inures to such persons as a vested right. By this statute a property right is created in the beneficiary of such a nature as would give the action the quality of survivorship, and take it out of the maxim, "*actio personalis moritur cum persona*." ' In *Haggerty v. Pittston*, 17 Pa. Super. Ct. 151, an action by a father for the death of his daughter was continued, upon the father's decease, in the name of his administrator; the court considering the value of the life lost as a species of property which vested in the father. In *Thomas v. Maysville Gas Co.*, 112 Ky. 569, 66 S. W. 398, the survival of an action brought by an administrator for the benefit of a sole beneficiary was sustained; the court holding that the action should be continued by the administrator, and the funds, when collected, held for the estate of the beneficiary. The court said: 'The fact that the defendant to the action succeeded in defeating a recovery until one or more of the beneficiaries died had no effect upon its liability to the administrator.' "

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But this Kentucky case cannot be regarded as of great weight as authority here, as the Kentucky statutes are materially different from our own.

The New York death statute does not appear unlike our own in any material respect, and in the Meekin case cited, *supra*, it is further said in the opinion:

"In *Quin v. Moore*, 15 N. Y. 432, it was held that the interest of the beneficiary was capable of assignment, which is the test of the right to revive. In deciding the case, the court said: 'The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true that at common law the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the statute comes in and declares that a right of action shall survive to the administrator. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into account. * * * But the claim of the administrator, and through him of the next of kin, is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. * * * The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the Legislature has chosen to regard as a pecuniary right, a right having the essential attributes of property, so that when it is taken away that compensation is due.'"

The Pennsylvania and New Jersey statutes likewise appear substantially the same as our own in every respect material to this question, and in the New Jersey case cited, *supra*, it is said in the opinion:

"The pecuniary injury of the beneficiary begins immediately on the death of the deceased, and is a continuing injury until compensated for in the condition expressed in the act. Suit must be brought within one year after the death of the deceased; but how long the litigation may be protracted is problematical. If the death of the beneficiary before the end of the litigation discharge the liability of the wrongdoer, the legislative purpose that the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation,

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and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law of harsh injustice. The death of the beneficiary pending suit will have a controlling influence over the quantum of recovery. The personal injury sustained would be limited in duration and extent to his lifetime. But the death of the beneficiary pending suit cannot be made available to abrogate the liability of the wrongdoer incurred for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending suit there was neither an abatement of the action in the common-law sense, nor was the cause of action to be compensated for, satisfied, or discharged. It is contended, however, that, inasmuch as the statute does not provide for an executor or administrator for the beneficiary in case of his death before the suit is determined, the action, therefore, abates; but no purpose would be accomplished by introducing such a personal representative into the record. The Legislature selected the personal representative of the original deceased as the party by whom the action should be brought, to whom the control of the suit was committed, to conduct it for the benefit of the next of kin."

It follows from what has been said that defendant's contention that the cause of action by the statutes given James Cheek, the father, as next kin of the deceased child, expired upon the death of the said James Cheek about ten months after the death of the child cannot be sustained, and this action, originally begun by said James Cheek, was, upon his death, properly revived in the name of the mother, Fannie W. Cheek, as administratrix of the estate of James Cheek, upon a stipulation, duly signed and filed, which reads as follows:

"It is hereby stipulated and agreed, and consent of the defendant is hereby given, that the above-entitled action may be revived in the name of Fannie W. Cheek, administratrix of the estate of James Cheek, deceased, and that said action may proceed in favor of the said Fannie W. Cheek, as administratrix of the said estate, and it is further agreed that an order to revive the same as above stated may be made by the court, or the judge thereof, on the 24th day of January, 1910, or at any time within five days thereafter, as it may suit the convenience of the court to hear the same."

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It is also urged, and we hold, that the trial court erred in so instructing the jury as to allow recovery for the value of the child's services beyond the time of the death of James Cheek, the sole beneficiary under the statute, and in refusing to give the following requested instruction, to wit:

"If you find a verdict for the plaintiff under the evidence and instructions, the amount of your verdict should be the actual pecuniary loss which James Cheek, the father of Thompsons Cheek, sustained during his lifetime on account of the death of his son, not exceeding the amount claimed in the petition, \$10,000."

This follows necessarily from the limitations of the right given by section 4313, *supra*, to the pecuniary loss or damage suffered by the beneficiary, James Cheek, and there are decided cases to this effect. See *Pitkin v. N. Y. C. R. Co.*, *supra*; *Cooper v. Shore Electric Co.*, *supra*.

This case should be reversed and remanded for proceedings in accord with the views herein expressed.

By the Court: It is so ordered.

ST. LOUIS & S. F. R. CO. v. CRINER.

No. 3000. Opinion Filed December 23, 1913.

(137 Pac. 705.)

1. **CARRIERS—Injuries to Passengers—Proximate Cause.** Though it may be made to appear that a railroad company is guilty of negligence in the carriage of a passenger, yet, before a recovery can be had for injuries subsequently sustained, and charged to have been the result of such acts of negligence, it must be shown by competent evidence that the acts of negligence were the proximate cause of the injury.
2. **SAME—Negligence—Evidence.** Where a female passenger suffers a miscarriage some two or three days after arrival at her journey's end, and where, during the course of the journey, the carrier may have been guilty of negligence, but where there was no competent evidence that the subsequent miscarriage was caused by or resulted from the negligent acts of the railroad, a verdict based partly on proof of miscarriage and attendant suffering cannot be sustained.

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3. **EVIDENCE—Opinion Evidence—Necessity.** Where the injuries are of such character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science, and must necessarily be determined by the testimony of skilled professional persons.
4. **APPEAL AND ERROR—Erroneous Instructions—Cure by Remittitur.** Instructions submitting to the jury an element of damage of which there was no competent proof, duly excepted to, where the verdict is general, with nothing to indicate how the damages were apportioned, cannot be cured by remittitur.
5. **TRIAL—Instructions—Application to Evidence.** Evidence examined and held insufficient to submit to the jury, as an element of damage, plaintiff's miscarriage.

(Syllabus by Sharp, C.)

Error from District Court, Carter County;
S. H. Russell, Judge.

Action by Etta Criner against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans, R. A. Kleinschmidt, and Fred E. Suits, for plaintiff in error.

H. C. Potterf and E. A. Walker, for defendant in error.

Opinion by SHARP, C. Plaintiff's action was brought to recover damages for injuries inflicted upon her, as well as those resulting from various negligent acts of the defendant, while a passenger on its railroad from Ardmore to Francis by way of Madill. It was charged that the negligence, carelessness, and cruelty of the defendant caused plaintiff great physical pain, which resulted in a miscarriage, whereby her health had been greatly injured in the sum of \$1,900, and that she had been further damaged in the sum of \$99.50, expended for nurse hire, physician's charges, and extra car fare. The trial resulted in a verdict for plaintiff for \$500.

Plaintiff's testimony tends to show that on the 4th day of March, 1909, she boarded a passenger train at Ardmore to visit sick relatives at Francis, a station on the line of defendant railway north of Ada. That, some miles out of Ardmore, it was discovered a railroad bridge was on fire, and the passengers

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aboard the train were ordered by the conductor to disembark, and walk across the ravine spanned by the burned bridge to where a train was standing on the opposite side ready to carry them on to the main line junction at Madill. That there was a high embankment where the passenger train was stopped on reaching the burned bridge, which embankment was some three or three and one-half feet from the lower step of the car. That, at the time, plaintiff was accompanied by her fourteen year old son and a child nineteen months old. That in alighting from the car the train crew afforded her no aid or assistance, though a fellow passenger came to her relief immediately thereafter. That she started to cross the railroad bridge, which was about 25 feet long and fifteen or twenty feet high, and while doing so became dizzy, and was aided across by a fellow passenger. She was then told by some of the train crew to get aboard the train standing on the opposite side of the bridge, which she did, also without aid, though this train was standing on a high embankment, and the lower car step was about the same distance from the ground as was the step of the car from which she had just disembarked. That, on account of the negligent acts of the defendant in the particulars mentioned, she became sick and had a severe headache, though after getting on the train she was very comfortable until she reached Ada. Between Ada and Holdenville it appears that other bridges had been burnt out, and the train on which she was a passenger from Madill was detoured from Ada to Shawnee over the Missouri, K. & T. Railway, and from Shawnee to Holdenville over the Chicago, R. I. & P. Railway. In changing cars at Ada for transportation on another train to Francis, she boarded the wrong train and was carried back south, and caused to spend the night at Roff, where she testified she had good accommodations, and, in answer to the question how she got along while there, stated: "Fine." On the morning following she boarded the regular north-bound passenger train. When this train reached Ada she was transferred to an emergency train running between Ada and Sasakwa through Francis. She reached her destination about four o'clock in the afternoon of the day following the commencement of her journey. At the

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time she arrived at Francis, her testimony shows she was feeling very badly, and, though she claims she was not able to sit up, her own testimony shows she walked a distance of four blocks to the home of her parents, where she stayed all night; that on the day following she walked from her father's residence to her sister's, a distance of three blocks, where she stayed until the day following, when she walked two blocks to the home of an uncle, where she remained five or six days; that about twelve hours after reaching her uncle's house, she miscarried, giving birth to a three months old fetus. In the meantime her husband had arrived in Ada and ordered a physician, who arrived about five minutes after the miscarriage. No examination of plaintiff was made by this physician, though he examined the fetus in another room, and afterwards told plaintiff it was unnecessary to make any examination of her as she was all right. Thereafter plaintiff was confined to her bed for five or six days, when she departed for her home near Ardmore. She testified that at the time of trial she was 41 years old, and had had two previous miscarriages, and was at the time of trial the mother of nine children, one a baby two months old. Dr. J. C. McNeese, her family physician, testified to having called to see Mrs. Criner on March 14th, and found her suffering a great deal from what he believed to be an abortion; that, on the day following, he returned and performed an operation on her, and gave her treatment. He further testified that he could not tell from her condition what was the cause of the abortion. Bud Holder testified as a witness for plaintiff, and his evidence is in the main corroborative of plaintiff's as to what occurred at the burnt bridge, though he stated that on mounting the car at the bridge the conductor placed a small platform on the ground underneath the steps, and, aided by the witness, assisted the plaintiff on the car.

We think the court was correct in overruling defendant's demurrer to plaintiff's evidence, as well as in refusing to direct a verdict for the defendant, as there was evidence tending to show negligence on the part of the defendant, and consequent illness and suffering by plaintiff, though perhaps not of a serious nature, apart from the main element of damage relied upon,

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consisting of the subsequent miscarriage and suffering occasioned thereby.

The really serious question presented is: Was the miscarriage and attendant suffering and illness the result of defendant's negligence? For not only must the negligence of the defendant be proved, but it must be shown that such negligence was the cause of the injury. That plaintiff, while at her uncle's house in Francis, had a miscarriage from which she suffered serious illness was established by the undisputed evidence. There was, however, no competent evidence that her miscarriage and attendant illness were the result of the proven acts of negligence. The physician summoned to wait on her at the time was not present as a witness, or if present, did not testify. Dr. McNeese testified that he could not tell from her condition the cause of the abortion. No hypothetical questions were put to this witness, and no effort was made to prove the cause of the miscarriage, unless it be from such inferences as might arise on account of the nearness in point of time of the injury and the negligence.

The court, in its charge to the jury, gave the following instruction, which was objected to by the defendant:

"There were two events occurring on the trip, to wit, the occurrence at the burned bridge where she had to alight from the train she started on and walked across the bridge to a transfer train, and also having to ride in a box car or caboose from Ada to Francis, as testified to by plaintiff, and from which you are expected to determine, when being considered separately, or together, were of sufficient cause to produce the premature birth of her child and consequent injuries and suffering, and so forth. And, on this matter you are instructed that it was plaintiff's duty to exercise such care as an ordinarily prudent person would have when alighting from the coach at the bridge, and, while you are the judges of the weight and value of the evidence, I submit to you if in alighting from the coach in her delicate condition was she prudent in carrying at the time a nineteen months old child in her arms, and if not so, and you should believe her injuries were produced as a result thereof, then she cannot recover for such cause, or causes, if any."

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Herein we think the court erred, for, without any competent evidence as to the cause of plaintiff's miscarriage, the court submitted to the jury whether or not the occurrence at the burnt bridge, and the fact that plaintiff had to ride in a box car or caboose from Ada to Francis, considered separately or together, furnished sufficient cause to produce premature childbirth and consequent suffering. Before this issue could have been properly submitted, there should have been competent proof introduced, connecting the injury with the negligence.

In *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, which case is spoken of by White in his work on Personal Injuries, sec. 23, as a classic in the law of probable and remote cause, Justice Strong announced the rule as follows:

"It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The question presented was first before this court in *Willet v. Johnson*, 13 Okla. 563, 76 Pac. 174, where it was held that the plaintiff, upon whom an assault and battery was alleged to have been committed, which resulted in inflammation of the uterus, Fallopian tubes, bladder and its appendages, should have offered evidence of skilled witnesses to show that her condition was the result of the assault; that it was impossible for persons unskilled in the practice of medicine or surgery to determine the cause of such disease as the plaintiff in that case was suffering from; that those questions, being subjects of science, must necessarily be determined by the testimony of skilled and professional men. The rule thus announced was followed by this court in the recent case of *Atchison, T. & S. F. Ry. Co. v. Melson*, 40 Okla. 1, 134 Pac. 388. In the latter case it was shown that the injuries for which a recovery in damages was sought, consisted of a bruised leg and hip, injury to the back and kidneys, in and about the lumbar region of the spine, resulting about one month afterwards (it was claimed) in a stroke of paralysis to the left leg, side, and arm. As to the cause of the paralysis, as it was observed by

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the court, the record was silent, except the mere circumstance that it occurred about a month after plaintiff received her fall. It was said:

"The evidence, to justify a court in submitting to the jury the question of whether or not a certain bodily condition complained of is the result of the injury, should show the connection between the two with reasonable certainty, and not leave it to vague speculation and conjecture. * * * Sufficiency of the evidence to prove that a disease from which the injured party is suffering * * * was caused by the injury depends, of course, upon the distinguishing facts of each individual case; the mere fact that a certain diseased condition might consistently arise from the injury is insufficient. The evidence should so exclude other causes, and the circumstances be such, that a reasonable inference arises that the injury caused the disease."

In the course of the opinion, it was further said:

"No one testified that the injury plaintiff received was at such a place and was of such a character as would likely result in paralysis, and there is absence of evidence from any one that such injury was the cause of the paralysis. There is competent evidence that by the fall plaintiff was bruised upon her leg, upon her hip, and across the back, and that from these bruises she suffered pain. These facts constituted proper elements of damage to be considered by the jury; but the alleged elements of damage, consisting of disease of the kidneys and paralysis, are not supported by any evidence tending to show that such diseases resulted from the injuries received by plaintiff's fall, and they should have been taken from the consideration of the jury by the instruction requested."

There proof of the accident, immediate injuries sustained, and the subsequent stroke of paralysis were shown, but it was held by the court there was an entire absence of any evidence to show that the stroke of paralysis was the result of the injuries received by plaintiff in the accident. Nor can we say, nor could the jury, that the miscarriage, sustained by the plaintiff some two or three days after her arrival at Francis, was caused by defendant's negligence. The mere fact that defendant was ill when she reached Francis, even though caused by defendant's negligence, was not proof of what caused her subsequent miscarriage. It will be remembered that the plaintiff had had two previous miscarriages, on one occasion, thirteen years before, giv-

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ing birth to a four months old fetus, and on another occasion, six years before, giving birth to a three months old fetus. Many reasons may have existed, wholly independent of the defendant's act, that would have caused premature childbirth, and the burden rested upon the plaintiff to show that the alleged acts of negligence effected that result. *St. Louis & S. F. R. Co. v. Davis*, 37 Okla. 340, 132 Pac. 337. The rule is well established that in an action for personal injuries, although the defendant may be shown to have been negligent in some manner, yet, unless the negligence so shown was the proximate cause of the injury complained of, no recovery can be had on account of such negligence. *Mayne v. Chicago, R. I. & P. Ry. Co.*, 12 Okla. 10, 69 Pac. 933; *St. Louis & San Francisco Railroad Co. v. Hess*, 34 Okla. 615, 126 Pac. 760; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256.

To what extent the damages were enhanced by the fact of the plaintiff's miscarriage, we are unable to say. The verdict being general, with nothing to indicate how much of the damages were apportioned to plaintiff's misfortune on account of her miscarriage and attendant illness, as distinguished from the sickness suffered by her while a passenger, or thereafter sufficiently proven to have resulted from defendant's negligence, a *remittitur* cannot be directed, but, instead, the cause must be reversed. *St. Louis, I. M. & S. Ry. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138; *Chicago & E. I. R. Co. v. Donworth*, 203 Ill. 192, 197, 67 N. E. 797; *Bates Machinery Co. v. Crowley*, 115 Ill. App. 540; *Whitman v. Atchison, T. & S. F. Ry. Co.*, 85 Kan. 150, 116 Pac. 234, 34 L. R. A. (N. S.) 1029, Ann. Cas. 1912D, 722; *Stout v. McMasters*, 37 Minn. 185, 3 N. W. 558; *Gulf, C. & S. F. Ry. Co. v. Rossing* (Tex. Civ. App.) 26 S. W. 243; *Scanlan et al. v. Davis* (Tex. Civ. App.) 124 S. W. 126; 3 Cyc. 439.

In view of another trial in this case, we wish to call attention to an instruction given by the trial court defining negligence, and which concluded thus wise:

"But to warrant a recovery by the person injured such person must not have contributed to the negligence or causes producing such injuries, and, in this case, among the other questions for you to determine is whether or not the plaintiff was

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guilty of contributory negligence, that is, whether her acts and conduct were such as aided in bringing about that which she complains of, and seeks damages therefor."

In at least two other places in the instructions, the court referred to the question of contributory negligence. The issue of contributory negligence was nowhere injected into the case, save in the court's instructions. The defendant's answer consisted of a general denial, and no claim was made that the plaintiff was guilty of any act of contributory negligence. The instruction was highly prejudicial to the plaintiff, and, while being favorable to defendant, and it may have no right of complaint (a question upon which we express no opinion), at the same time the instruction or allusion to the fact of contributory negligence should not have been permitted.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

By the Court: It is so ordered.

McMURTREY v. BRIDGES.

No. 3002. Opinion Filed December 23, 1913.

(137 Pac. 721.)

1. **ESCROWS—Time When Deed Takes Effect—Delivery.** A deed of conveyance of real estate placed in escrow when made and duly delivered to the grantee at a subsequent date, when there has been compliance with the conditions of the escrow agreement, will ordinarily take effect at the time of such final delivery, and not before.
2. **SAME—Warranty Against Taxes—Construction.** A warranty against taxes "at time of delivery," in deed conveying real estate, refers to and so warrants at time of final and due delivery from escrow, in which deed had been placed when made.
3. **SAME—Action by Grantee—Right of Recovery.** A petition by a grantee, in deed warranting land conveyed against taxes at the time of its delivery, to recover from the grantor the amount of taxes which became due and a lien upon the land between the time the deed was made and placed in escrow and the time

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it was duly delivered therefrom, the petitioner having paid such taxes after final delivery of the deed to him, is not insufficient merely because such taxes had not become due nor a lien upon the land when said deed was made and placed in escrow.

(Syllabus by Thacker, C.)

*Error from County Court, Alfalfa County;
F. M. Gustin, Judge.*

Action by Frank McMurtrey against John F. Bridges. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Titus & Carpenter, for plaintiff in error.

Talbot & Owen, for defendant in error.

Opinion by THACKER, C. The position of the parties, in respect to their descriptive titles, remains the same as in the trial court.

Plaintiff in effect alleged that on August 7, 1909, he contracted to purchase a certain tract of land of defendant; that at the same time defendant, in accord with said contract, executed and put in escrow, for final delivery to plaintiff on January 1, 1910, upon condition of performance of certain obligations by plaintiff in respect to the purchase price, a deed to said land, with usual covenants of warranty, and including a warranty against all charges, taxes, assessments, and incumbrances "at time of delivery"; that on January 3, 1910, the first day of the month being a legal holiday and the second being Sunday, plaintiff had fully performed his obligations under said contract and, being entitled thereto, received delivery of said deed from the depository; but at that time there was a tax charge of \$49.57, which had incumbered said land since October 15, 1909, standing unpaid against it, and which, defendant having failed to pay, plaintiff was compelled to and did pay; and, defendant having failed and refused to reimburse plaintiff after notice to do so, plaintiff seeks to recover this sum of him.

Defendant has failed to file any brief; and, as no other ground is apparent at first blush, we will assume the demurrer was sustained upon the grounds indicated in plaintiff's brief, to

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wit: (1) That when the deed was finally delivered on January 3, 1910, it related back and operated as a conveyance to plaintiff on and from August 7, 1909, so as to limit said warranty to that date as the "time of delivery"; and (2) that liability is imposed upon the plaintiff by section 18, art. 10, c. 38, Session Laws of 1909, which reads as follows:

"That as between grantor and grantee of any land where there is no express agreement as to who shall pay the taxes that may be asserted thereon, taxes on any real estate shall become a lien on such real estate on the 15th day of October of each year, between the 1st day of March and the 15th day of October next following, the grantee [*grantor*] shall pay the same, but if conveyed between the 15th day of October and the 1st day of March the grantee shall pay the same."

The general rule is that a deed held in escrow takes effect and operates as a conveyance at the time and after it is or should be delivered to the grantee; and, while the doctrine of relation, which gives a deed effect as a conveyance when and after it is put in escrow, will be applied to effect the otherwise apparent intent of the parties, or to prevent injustice, this doctrine cannot be invoked to create or discharge a liability having no other foundation. *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; 2 Page on Contracts, sec. 587; *Powers v. Rude*, 14 Okla. 381, 79 Pac. 89; *Pomeroy v. Insurance Co.*, 86 Kan. 214, 120 Pac. 344, 38 L. R. A. (N. S.) 142, Ann. Cas. 1913C, 170; *State Bank v. Evans*, 15 N. J. Law, 155, 28 Am. Dec. 400; *White Star Line Steamship Co. v. Moragne*, 91 Ala. 610, 8 South. 867; *Tiedeman on Real Property*, sec. 800; 2 *Wait's Actions and Defenses*, 495; *May v. Emerson*, 52 Ore. 262, 96 Pac. 454, 1065, 16 Ann. Cas. 1129; 1 *Devlin, Deeds*, sec. 328; *Pruitsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; 4 *Kent's Com.* 454; *Rathmell v. Shirley*, 60 Ohio St. 187, 53 N. E. 1098; *Scibel v. Higham*, 216 Mo. 121, 115 S. W. 987, 129 Am. St. Rep. 502; *Green v. Putman*, 1 Barb. (N. Y.) 500; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161; *Ketterson v. Inscho*, 55 Tex. Civ. App. 150, 118 S. W. 626; *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685; *Sparrow v. Smith*, 5 Conn. 113; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Anderson v. United Realty Co.*, 29 Ohio Cir. Ct. R. 267;

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Foxley v. Rich et al., 35 Utah, 162, 99 Pac. 666; *Whitfield v. Harris*, 48 Miss. 710; *Bither v. Christensen*, 1 Cal. App. 90, 81 Pac. 670; *Price v. Pittsburg, Ft. W. & C. R. Co.*, 34 Ill. 13; *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003; *Whitmer v. Schenk*, 11 Idaho, 702, 83 Pac. 775; *Stephens v. Rinehart*, 72 Pa. 434; *Simpson v. McGlathery*, 52 Miss. 723; *Shirley Lessees v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Hunter Realty Co. v. Spenser*, 21 Okla. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622; *Knapp v. Nelson*, 41 Colo. 447, 92 Pac. 912; *Francis v. Francis*, 143 Mich. 300, 106 N. W. 864; *Baker v. Snively*, 84 Kan. 179, 114 Pac. 370; *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117; *Batterton v. Smith*, 3 Kan. App. 419, 43 Pac. 275; *Joiner v. Ardmore Loan & Trust Co.*, 33 Okla. 266, 124 Pac. 1073.

By express contract, embodied in the warranty clause mentioned, the defendant was bound to pay this tax charge; and the section of the statute quoted *supra* is inapplicable.

We are therefore of opinion that this case should be reversed and remanded, with instructions to the trial court to overrule the demurrer and otherwise proceed in accord with the views expressed in this opinion.

By the Court: It is so ordered.

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No. 3037. Opinion Filed December 23, 1913.

(137 Pac. 697.)

1. **BILLS AND NOTES—Action by Assignee—Defense—Payments to Payee.** Where one, who assumes the payment of a non-negotiable note and attached interest coupons, has no notice of the assignment of the note and coupons, or of the mortgage given to secure the payment thereof, proof of the payment of the note and coupons to the payee named therein, at the designated place of payment, is a good defense against proceedings on the part of the assignee to enforce payment.
2. **SAME—Nonnegotiable Note—Defense.** A nonnegotiable note, transferred to an innocent purchase before maturity and for a valuable consideration, without notice to the maker thereof, or

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to one who assumes its payment, is subject to all legal defenses which might be interposed against the note in the hands of the original payee.

3. **SAME—Action by Assignee—Defense—Payment.** Where the assignee of a nonnegotiable note, to which are attached interest coupons, which note and coupons are secured by real estate mortgage, takes the same by indorsement on the principal note alone, and by written assignment of the mortgage, which assignment is not put of record for over four and one-half years, and fails to give the maker any notice of the assignment, and allows the original payee to collect the interest coupons at the designated place of payment, either from the maker of the coupon notes or the subsequent owner of the mortgaged lands, and to forward the canceled coupons to the one making payment, the subsequent payment in good faith and without notice of the principal note, though before maturity, to the payee named therein, at the designated place of payment, protects the one making payment against liability to the assignee, although the note was not produced and delivered at the time it was paid, it not being known to the payer that the note was not in the possession or under the control of the one to whom payment was made.
4. **SAME—Effect to Discharge Liability.** Under the facts stated in the preceding paragraph, where such original payee is also the agent of the subsequent owner of the mortgaged land, for the purpose of procuring a new loan and paying off the old, his failure to pay over the proceeds of the loan by him received to the assignee of the note does not render the payer liable to a second liability thereon, the money having been received by the former and ostensible owner in settlement of the note.
5. **SAME.** Payment in such case having been made to the ostensible owner, who thereupon executes a release of the outstanding mortgage, it cannot be said that the failure to pay over to the assignee the money paid was an act for which the one causing payment to be made would be liable.

(Syllabus by Sharp, C.)

*Error from Superior Court, Custer County;
J. W. Lawter, Judge.*

Action by George M. Ruble against W. F. Seibold and another. From a judgment in favor of plaintiff, defendant named brings error. Affirmed.

George T. Webster, for plaintiff in error.

M. L. Holcombe, for defendants in error.

Opinion by SHARP, C. On July 28, 1903, James Abernathie executed to the defendant Winne & Winne his promissory

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note in the sum of \$720, payable ten years after date. To said note were attached eleven interest coupons, of which the first was for \$8.41, due October 1, 1903, nine for \$50.40, due October 1st of each succeeding year thereafter, and one for \$41.59, due July 28, 1913. The note and interest coupons were secured by a real estate mortgage on a quarter section of land in Custer county. On June 18, 1904, James Abernathie sold said land to J. F. Lamb, who assumed the payment of the Winne & Winne mortgage indebtedness. On the 4th day of December, 1906, the land so mortgaged was sold by Lamb to the defendant in error, Ruble, who likewise assumed the payment of said mortgage indebtedness. July 12, 1907, defendant in error, Ruble, made application to the Union Central Life Insurance Company of Cincinnati, Ohio, for a loan of \$1,200 on said land, naming the defendant Winne & Winne as his agent for that purpose. A loan of \$1,100 was thereafter made, and the proceeds thereof paid to the order of Winne & Winne by the insurance company. The payee of the \$720 note, Winne & Winne, on August 5, 1903, executed an assignment of the mortgage given to secure the same to the plaintiff in error, W. F. Seibold, which assignment, however, was not placed of record in Custer county until April 13, 1908. On August 8, 1903, defendant Seibold claims to have purchased said note and mortgage, paying therefor the face of the note. An indorsement in blank was written upon the back of the principal note, assigning without recourse both it and the attached coupons, and, together with the written assignment of the mortgage, they were on said last-mentioned day delivered to defendant at his home in Danbury, Iowa. On October 9, 1907, Winne & Winne, claiming to be the owner of said original mortgage, executed a release thereof, which was duly recorded in Custer county on October 14th following. This, according to the record, perfected the title in Ruble, and made his mortgage of July 25, 1907, to the Union Central Life Insurance Company, a first lien on said land.

This action is brought by the plaintiff, Ruble, who claims to have paid to Winne & Winne, the payee of the original note, the amount thereof out of the proceeds of the loan obtained from

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the Union Central Life Insurance Company, and seeks to cancel the assignment of the mortgage and indebtedness secured thereby, made by defendant Winne & Winne to the codefendant, W. F. Seibold, it being charged that the assignment of said mortgage, appearing of record, constitutes a cloud upon plaintiff's title to the land. Defendant Seibold in his answer seeks to recover a judgment on the indebtedness assigned him, and foreclosure of the original mortgage.

It is said by counsel for plaintiff in error in his brief that there is but one question involved in the case, namely, that of agency, and, if it be found that Winne & Winne was Ruble's agent to procure the loan from the insurance company, then that the former's embezzlement or wrongful application of the proceeds would be an act for which the principal, Ruble, must suffer. This is the single issue upon which plaintiff in error seeks a reversal.

The first question necessary to determine is that of the negotiability of the Abernathie note, given Winne & Winne July 28, 1903, for \$720. We do not understand it is seriously urged that the note is negotiable. Under the decisions of this court construing sections 4626 and 4627, Comp. Laws 1909 (which must control and determine its character), on account of the provisions of said note, obviously it is nonnegotiable. *Dickerson v. Higgins et al.*, 15 Okla. 588, 82 Pac. 649; *Clevinger v. Lewis*, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56; *Clowers et al. v. Snowden et al.*, 21 Okla. 476, 96 Pac. 596; *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177; *Bell v. Riggs*, 34 Okla. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111; *Citizens' Savings Bank v. Landis et al.*, 37 Okla. 530, 132 Pac. 1101.

Being nonnegotiable, the rights of the transferee would be governed by the rule announced by this court in *Randall Co. v. Glendenning et al.*, 19 Okla. 475, 92 Pac. 158, in a very similar case:

"That where a nonnegotiable note is transferred to another, although that party is an innocent purchaser, and the transfer

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is made before maturity and for a valuable consideration, yet if made without notice, either actual or constructive, to the makers thereof, it is subject to all the legal defenses which might be interposed against the note in the hands of the original payee."

There was no evidence that either Abernathie, Lamb, or Ruble had any knowledge of the assignment of the note by Winne & Winne to Seibold, but, on the other hand, each of these witnesses testified they had no such notice, while the defendant Seibold made no attempt to show that either of the respective owners of the land had any notice whatever of the assignment of the note and mortgage, except that, at the time of delivery to him, Winne & Winne had said that Abernathie would be notified of the assignment. Although, as already seen, the assignment of the mortgage was executed at Wichita, Kan., on August 5, 1903, and delivered to defendant at Danbury, Iowa, on August 8th following, it was not placed of record in the county where the land was situated until April 13, 1908. While the defendant Seibold, in his deposition given in the narrative form (at the taking of which it does not appear the plaintiff was represented), stated that he had had continuous possession of the note and mortgage from the time of his purchase until sent by him to his attorney in the preparation of the defense in the trial court, yet it appears from the uncontradicted evidence of Abernathie that he paid the first coupon to Winne & Winne, and received a notice (presumably from Winne & Winne), the following fall, of the maturity of the second coupon. Lamb testified that he paid two coupon notes to Winne & Winne, from whom he received letters accompanying the canceled coupons. The letter inclosing coupon number two, which matured October 1, 1904, was addressed to James Abernathie; while that inclosing coupon number three, which matured October 1, 1905, was addressed to J. F. Lamb; and both of these letters were signed by Winne & Winne. The evidence is somewhat confusing about coupon number four, which, while offered in evidence by plaintiff, does not appear in the record, which fact, however, in no wise affects the issues. Clearly it is made to appear that Seibold intrusted Winne & Winne to collect for him the maturing interest coupons, as he admits he intrusted

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them to notify the maker of the assignment. Neither of the coupons in evidence appears to have been indorsed, and defendant's answer charges the assignment to have been made by an indorsement in writing on the back of the principal note. There was, therefore, nothing upon these canceled coupons calculated to notify either the original maker, or the subsequent owner of the land, that any one other than Winne & Winne had any interest in them. Not only was Seibold guilty of negligence in not putting his assignment of record for over four and one-half years, and in neglecting to notify the maker of the assignment, but by permitting the original payee to collect the annual interest, and surrender the canceled coupons, thereby justifying the belief that the note and coupons were still owned by and in the possession of the payee. Ruble had no actual notice of the assignment until the receipt of a letter by him from Stewart & Burns, of Wichita, on May 8, 1908, a few weeks after the assignment had been placed of record. The facts in this case are very similar to those in *Randall Co. v. Glendenning et al.*, *supra*. In each case payment was made of an unmatured nonnegotiable note to the original payee, prior to the placing of record of the assignment, and without notice thereof to the maker. The same question was before the court, and the same conclusion reached in *Dickerson v. Higgins et al.*, 15 Okla. 588, 82 Pac. 649.

It is urged that upon payment of the proceeds of the Union Central Life Insurance Company loan to Winne & Winne, the original note not having been delivered up to plaintiff, payment was made at the risk of the payer, and as Winne & Winne was plaintiff's agent in procuring the loan, and was authorized to pay off all liens on the land, and to send the draft to make such payment at Ruble's risk, therefore plaintiff should not recover, and *McNabb et al. v. Hunt*, 28 Okla. 43, 119 Pac. 210, and *Owings v. Howington*, 31 Okla. 651, 124 Pac. 1058, are cited as authority supporting this claim. The cases are not in point, as the facts there involved readily disclose.

We must not lose sight of the fact that the note is nonnegotiable. There are many authorities supporting the rule that payment of a nonnegotiable note to the assignor, after the same has

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been transferred, whether before or after maturity, but before notice of the transfer, will be deemed good. *Fowle v. Outcalt*, 64 Kan. 352, 67 Pac. 889; *Warren v. Gruwell et al.*, 5 Kan. App. 523, 48 Pac. 205; *Chapman v. Steiner et ux.*, 5 Kan. App. 326, 48 Pac. 607; *Lockrow v. Cline*, 4 Kan. App. 716, 46 Pac. 720; *Wright v. Shimek et al.*, 8 Kan. App. 350, 55 Pac. 464; *Killam v. Schoeps*, 26 Kan. 310, 40 Am. Rep. 313; *Quinn v. Dresback*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; *Morgan v. Neal*, 7 Idaho, 629, 65 Pac. 66, 97 Am. St. Rep. 264; *Pace v. Gilbert School et al.*, 118 Mo. App. 369, 93 S. W. 1124; *Gibson v. Pew*, 3 J. J. Marsh. (Ky.) 223; *Stevens v. Parker*, 5 Allen (Mass.) 333; *Allein v. Agricultural Bank*, 3 Smedes & M. (Miss.) 48; *Weinick v. Bender*, 33 Mo. 80; *Dunn v. Meserve*, 58 N. H. 429; *Swan v. Craig*, 73 Neb. 182, 102 N. W. 471.

In *Vann v. Marbury*, 100 Ala. 438, 14 South. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70, in an opinion by Stone, C. J., it appeared that the maker of the note, which under the laws of that state was nonnegotiable, had no knowledge of the transfer by the payee, and it was held that payment made to the payee would be a complete protection, notwithstanding the note was not produced and delivered up at the time of payment. It was there said:

"In *Hart v. Freeman*, 42 Ala. 567, we said: 'The maker of a promissory note, not negotiable, may pay the same to the payee after its maturity, even though the note be not produced and delivered up at the time of payment, provided the maker has had no notice of the indorsement or transfer of the note to a third person. And such payment would be a valid and competent defense against the note, should it afterward appear and suit be brought thereon against the maker by another holder.' It was further held in that case that the burden of proof rests upon the plaintiff in the action, the defendant having proved the payment, to show that the defendant had notice of the transfer or indorsement before the payment was made. We cannot perceive that the fact that payment of the note in controversy was made before maturity takes the case without the influence of the decision in *Hart v. Freeman*."

In *Blass v. Young*, 7 Kan. App. 728, 52 Pac. 577, neither the last coupon nor the principal note was returned to the payer.

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The notices were sent out by the Western Farm Mortgage Trust Company, the legal successor to the payee, Western Farm Mortgage Company, and it was held that the note being nonnegotiable and the maker not having actual or constructive notice of its assignment, he was protected in making payment to the payee. See, also, *Bensley v. Bartholf*, 137 Ill. App. 420; *Id.*, 234 Ill. 336, 84 N. E. 928; *Williams v. Pelley et al.*, 96 Ill. App. 346; *McCabe v. Farnsworth*, 27 Mich. 52; Pingree on Mortgages, sec. 1151. The rule is announced in Wade on Notice, sec. 431, as follows:

“One of the incidents of assignment of demands not recognized as negotiable, according to the law merchant, as well as overdue negotiable paper, is that the assignee takes subject to all equities subsisting between the parties at the time. The debtor is entitled to all credits for payment, as well as all set-offs which he may have against the original creditor. Even after the assignment has been made, the debtor, being ignorant of that fact, will be protected in making payment of the debt in whole or in part, or in any set-off to the demand he may have acquired.”

While prudence would perhaps require, and the law in many cases exacts, that the payer, upon payment of an unmatured note, require its production, yet, where for a long term of years the assignee of a nonnegotiable note has permitted the assignor to pose as the ostensible owner, and in his behalf collect the annual interest, remit the same, and forward canceled coupons, without any form of notice to the maker, constructive or actual, of the assignment, the delivery of the note will not be required, unless it should appear that it was known to the payer that the note was not at the time in the possession of the one to whom payment was made. The assignee is charged with knowledge of the law that his note is nonnegotiable, and with knowledge of the fact that payment may be made to the payee, and in order that he may be protected, the law enjoins on him notice to the maker, of his claim of title, or at least to refrain from such conduct as will tend to warrant the belief that the payee yet remains the owner.

True, Ruble intrusted the payment of the first mortgage note to Winne & Winne, who at the time occupied a dual position,

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being not only the agent of Ruble, who had assumed payment of the note, but, as well, the payee of the note. The draft drawn by Ruble and wife on the Union Central Life Insurance Company was payable to the order of Winne & Winne, and was paid to his order by the drawee. The money evidenced by the draft thus passed to Winne & Winne's individual credit, and, as against the plaintiff in error, was, in effect, a payment of the original note, not to Winne & Winne as agent of Ruble, but to Winne & Winne the ostensible owner. The duality of the relation of Winne & Winne to Ruble marks a distinction between the case under consideration and many of the reported cases involving the question of agency. Here the former owner of the note, and, so far as at the time known to Ruble, the real owner, received payment from one authorized to make payment, the original payee and ostensible owner even going so far as to execute a release of the original mortgage, in which it is recited that payment in full had been made. The note having been paid, the plaintiff was entitled to the relief sought.

The judgment should be affirmed.

By the Court: It is so ordered.

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No. 3089. Opinion Filed December 23, 1913.

(137 Pac. 349.)

1. **JUSTICES OF THE PEACE—Appeal—Bill of Particulars—Necessity—Replevin.** Where, in an action in replevin in a justice's court, the affidavit for replevin contains everything that is necessary to be stated in a bill of particulars, and no objection is there urged, a subsequent objection that no bill of particulars had been filed, made on appeal to the county court, will not be deemed sufficient cause for reversal, though the court on appeal might properly have required the filing of new or amended pleadings.
2. **SAME—Pleading.** The right to file new pleadings in the county court, on appeal from a justice of the peace court, depends upon whether it is in furtherance of justice to permit such pleadings to be filed, which is to be determined by the county court in the exercise of a sound judicial discretion.

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3. **TRIAL—Order of Proof—Discretion.** The order in which evidence shall be received must to a great degree be left to the sound discretion of the trial court, and, unless it is made to appear that such discretion has been abused, no reversal will be had.
4. **CHattel MORTGAGES—Priority of Liens—Payment of Prior Mortgage.** Upon the voluntary payment of a chattel mortgage indebtedness by the mortgagor, a second mortgage on the property included in the original mortgage, ~~so instantl~~, becomes a first and prior lien thereon, and the holder of such mortgage is entitled to recover possession of the mortgaged property according to the terms of his mortgage.
5. **SAME—Stipulation Against Second Mortgage—Effect.** A provision in a chattel mortgage that the mortgagor shall not make a second mortgage or lien upon the mortgaged property, without the written consent of the mortgagee, and such consent is neither asked nor given, does not thereby make void, as against one claiming under a second mortgage, a mortgage given in violation of said provision.

(Syllabus by Sharp, C.)

*Error from County Court, Pottawatomie County;
Ross F. Lockridge, Judge.*

Action by the C. C. Chapell Hardware Company against J. N. Ackerman. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Baldwin, W. W. Pryor, C. G. Pitman, and A. J. Carlton, for plaintiff in error.

Mark Goode and Roscoe C. Arrington, for defendant in error.

Opinion by SHARP, C. This is an action in replevin begun in a justice of the peace court in Pottawatomie county on March 7, 1910, by defendant in error, against plaintiff in error, to secure the possession of a span of mules at the time in the possession of the latter. No bill of particulars was filed; the affidavit in replevin being considered and treated as a bill of particulars. In said affidavit it was set out that the plaintiff was the holder of a mortgage on said mules and claimed a special interest in them by reason of the fact that an indebtedness of \$172.45, secured by said mortgage, remained due and unpaid; that defendant had, subsequent to the execution of said mort-

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gage, acquired possession of said mules, and, although requested to deliver them to plaintiff, wrongfully refused so to do. The affidavit in replevin complies fully with the requirements of the statute (section 5399, Rev. Laws 1910) as to what such affidavit shall contain, and no objection on that account is made. Trial being had in the justice court, plaintiff was awarded possession of the mules, and defendant appealed to the county court, where trial was had before a jury, resulting in a judgment for the plaintiff for the mules, or for the value of plaintiff's interest therein. From this judgment the defendant below has appealed to this court.

The first assignment of error urged is that the court erred in overruling defendant's objection to the introduction of evidence by the plaintiff for the reason that no bill of particulars had been filed. Is it necessary, therefore, that a bill of particulars be filed in a justice of the peace court in an action of replevin, or will an affidavit in replevin, containing all the elements necessary to constitute a good bill of particulars, suffice? Section 5414, Rev. Laws 1910, provides:

"In all cases before a justice, the plaintiff, his agent or attorney, shall file with such justice a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of particulars if he claim a set-off, and the evidence on the trial shall be confined to the items set forth in said bill."

Section 5399, *supra*, provides what an affidavit in replevin shall contain. It does not appear that any objection was made to plaintiff's failure to file a bill of particulars in the justice court; the question for the first time being raised on appeal in the county court. Both statutes mentioned were adopted from Kansas, the Supreme Court of which state has twice determined the identical question here presented. In *Starr v. Hinshaw*, 23 Kan. 532, the court said:

"This was an action of replevin brought by Andrew Hinshaw against William T. Starr before a justice of the peace, to recover 28 head of sheep and lambs. The action was regularly brought and tried, except that the plaintiff did not file any formal bill of particulars. The plaintiff, however, and the justice, treated the plaintiff's affidavit, upon which the summons and order of

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delivery was issued, as a bill of particulars. We perceive no error in this. The affidavit contains everything that is necessary to be stated in a bill of particulars; and, while a plaintiff in a replevin suit in a justice's court might very properly file an additional paper as a bill of particulars, yet if he chooses to use his affidavit as such, and the court permits him to do so, we do not think that any material error is committed. The statutes do not require that any additional paper be filed as a bill of particulars in a justice's court."

In *Casterline v. Day*, 26 Kan. 306, the same conclusion was reached; the court expressing its views as follows:

"It has been decided that an affidavit in replevin constitutes a sufficient bill of particulars, if unchallenged. *Starr v. Hinshaw*, 23 Kan. 532. True, the statute prescribes that, in all cases before a justice of the peace the plaintiff shall file a bill of particulars, but an affidavit in replevin states all the facts required to be stated in a bill of particulars, and hence in such cases a bill of particulars is necessary simply because of such technical provision of the statute. A trial and judgment upon simply the affidavit in the replevin action is, if not objected to, sufficient and valid, not only when attacked, but also when challenged by proceedings in error. 23 Kan. *supra*. Doubtless the district court on appeal may require new or amended pleadings. Justices' Act, sec. 122. But this only in furtherance of justice."

Section 5467, Rev. Laws 1910, requires that a case on appeal from a justice of the peace court shall be tried *de novo* upon the original papers on which the cause was tried by the justice, unless the appellate court in furtherance of justice allow amended pleadings to be made or new pleadings to be filed. *St. Louis & S. F. R. Co. v. Steele*, 37 Okla. 536, 133 Pac. 209; *Horton v. Early*, 39 Okla. 99, 134 Pac. 436. We are satisfied with the rule announced by the Supreme Court of Kansas in the cases quoted, and conclude that no error was committed by the trial court in overruling defendant's objection to the introduction of plaintiff's evidence.

The second assignment of error, that the court erred in admitting incompetent, irrelevant, and prejudicial evidence offered by the plaintiff, and objected to by the defendant, is evidently based largely upon the same argument as the first, namely, that all evidence was admitted improperly, there being no bill of

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particulars filed, and is decided adversely to plaintiff in error's contentions for the reasons already stated. It is further said, however, under this assignment, that all evidence as to the mortgage held by the plaintiff (a second mortgage) was improperly admitted for the reason that at the time no evidence had been introduced to show the first mortgage had been discharged. This contention does not demand further consideration than to say that the order of evidence is a matter of administrative control, and is usually said to be within the court's discretion. *Standifer v. Sullivan et al.*, 30 Okla. 365, 120 Pac. 624; *McBride v. Steinweden et al.*, 72 Kan. 508, 83 Pac. 822; 1 Chamberlayne on Evidence, sec. 367.

Under the fourth assignment of error, counsel in their brief say:

"The principal contention, however, is that the court erred in overruling the demurrer to the defendant in error's evidence."

Apparently the theory of the plaintiff's case in the trial was that, although its mortgage when taken was a second mortgage, the first mortgage having subsequently been paid, thereby automatically its mortgage became a first lien; that, when Schiffman sold the mules to Lampe, they were sold subject to said mortgage, and likewise when the mules were sold by Lampe to defendant. Defendant in the county court sought to prove that under the provisions of the first mortgage the mules had been purchased by the mortgagee, Holman, for the bank of which he was cashier, and that a bill of sale had been given by Schiffman to the bank, and the bank had sold the mules to Lampe, who in turn sold them to defendant. This testimony, however, was squarely met by that of Holman and Schiffman. The former testified that he had never had the mules in his possession, nor had he sold them or contracted to sell them to anyone; that neither he nor the bank had taken the mules under the mortgage; and that the note given him by Schiffman, secured by the first mortgage, had been fully paid off and discharged. Schiffman, the mortgagor, testified that he sold the mules to Lampe, and made out a bill of sale to him, and not to the bank; and that there was no foreclosure of the mortgage, but instead, as already stated,

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a sale by him to Lampe, on account of which transaction the mortgage note was paid. True, the purchaser, Lampe, testified that he obtained a bill of sale from the bank, but upon this conflicting testimony we are concluded by the jury's verdict. The manner, source, time, or means of payment, or by whom paid, are questions not presented for our consideration. Nor is the question of subrogation involved. No objection is made to the court's charge, nor is any objection urged in this court as to the testimony introduced or offered. We confine our decision on this question to the single issue that, by the payment of the note secured by the first mortgage, that mortgage was thereby satisfied.

Attention is called to a provision in the first mortgage which reads:

"The first party shall not make a second mortgage or lien upon said property, or remove the same from its location herein named, without the written consent of said second party."

We need only to say that, this clause in the first mortgage having been violated by the mortgagor, neither he nor those claiming through him can take advantage of it to the prejudice of the holder of the second mortgage. In New Hampshire, a statute forbade the making of a second mortgage of personal property without reference in it to the first, and it was held that a second mortgage executed in violation of the statute was not void; that the object of the statute was to secure the rights of the second mortgagee, and this would be defeated by holding the mortgage void; that, while the mortgagee might avoid the mortgage if he was to suffer, it could not be avoided by the mortgagor. *Leach v. Kimball*, 34 N. H. 568; *Jones on Chattel Mortgages*, sec. 39. See, also, *Tootle et al. v. Taylor et al.*, 64 Iowa, 629, 21 N. W. 115.

The fifth assignment of error is based upon the action of the court in overruling defendant's motion to direct a verdict in his favor. It does not appear from the record that such motion was ever filed, and the alleged error, therefore, cannot be considered.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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No. 3109. Opinion Filed December 23, 1913.

(137 Pac. 354.)

1. **JUDGMENT—Default—Pleading.** There can be no judgment by default where there is on file an answer or other pleading raising an issue of law or fact.
2. **SAME.** Before a default judgment can be properly entered, the answer or other plea must be disposed of in an orderly way by motion, demurrer, or in some other manner.
3. **SAME—Limitations.** A petition, to recover on a foreign judgment, on its face, clearly showed that the cause of action therein set out was barred by the statute of limitations; an answer was filed specifically setting up the bar of the statute, which answer was not attacked by demurrer or motion; the court, on motion of plaintiff, in the absence of defendant and his counsel, entered a purported default judgment, and trial without a jury was had on the petition and answer; the only evidence introduced was certified copies of the petition, answer, reply, and judgment of the original trial court. **Held**, the defense of the statute of limitations, being well pleaded, and properly before the court, should have been by the court sustained, and there being no competent evidence before the court sustaining the purported cause of action, and the defense pleaded being full and sufficient, the court committed reversible error in entering judgment for plaintiff.

(Syllabus by Robertson, C.)

*Error from Superior Court, Pottawatomie County;
Geo. C. Abernathy, Judge.*

Action by William Cooper against W. B. Crossan. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

P. O. Cassidy, for plaintiff in error.

E. E. Hood and Lydick & Eggerman, for defendant in error.

Opinion by ROBERTSON, C. This was an action on a foreign judgment rendered against W. B. Crossan in the district court of Miami county, Kan., on June 8, 1908, in the sum of \$1,000 and interest, in favor of Wm. Cooper, who on September

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24, 1910, filed his petition in the superior court of Pottawatomie county and sought thereby to recover on, and keep alive, the said judgment in this state. The petition is in the usual form and has attached thereto and made a part thereof the petition, answer, reply, and judgment of the district court, the opinion and judgment of the Supreme Court of Kansas affirming the decision of the district court, together with an opinion and judgment of the Supreme Court of Kansas denying a rehearing, together with the mandate, all of which were attached to said petition as exhibits and certified to by the clerk of the district court of Miami county, Kan. Crossan answered, first, by general denial; second, by a plea of the statute of limitations in the following language:

"As a second and further defense to the cause of action of plaintiff, the defendant alleges: That he has been an actual and *bona fide* resident of Pottawatomie county, state of Oklahoma, for more than eight years last past, and is now a resident in good faith of said county and state, and that said residence has been actual and continuous. That the said cause of action as set out and alleged in the petition of plaintiff did not accrue to said plaintiff at any time within one year before the commencement of this suit, and that said cause of action is barred by the statute of limitations in such cases made and provided."

This answer was filed January 21, 1911. On April 19, 1911, the case being reached for trial, and neither the defendant nor his attorney appearing, it was ordered that the defendant be adjudged in default, and, the plaintiff waiving a jury, trial was had to the court; evidence was introduced, and a judgment in favor of plaintiff and against the defendant was entered in the sum of \$1,324.20. On the same day the defendant filed his motion to set aside the judgment, alleging that default should not have been adjudged for the reason that defendant had answered in due time, and the said answer alleged that the cause of action stated in the petition was barred by the statute of limitations, which allegations were not denied by reply, or in any other manner, by the plaintiff, and that the petition shows on its face that the suit was on a foreign judgment obtained June 8, 1908, and that this action was not filed until December 24, 1910. The affidavit supporting the motion to set aside the default was made

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by P. O. Cassidy, who was attorney for defendant, and alleges that he had full and sole charge of the suit; that he filed the answer in due time; that no reply had ever been filed by plaintiff thereto; that the trial of the cause had been regularly set by the court for April 17, 1911; that he had been in court on the morning of April 17, 1911, and was informed by the court that the assignment was behind and that the cause would not likely be reached before the last of the week; the said attorney was in court on the morning of the 18th of April and was again informed that the assignment was still behind; that he went again on the 19th and was informed by some attorney who was then trying a case that the trial then before the court would take most of the day; and that said P. O. Cassidy caused the defendant Crossan to go to the courtroom about three o'clock p. m. on the 19th to ascertain the probability of the cause coming to trial on that day; and that said Crossan returned and reported that judgment by default had just been taken. A copy of the motion to set aside the default, together with the affidavit in support thereof, was served on plaintiff April 19, 1911, at five o'clock p. m. A motion for a new trial was filed in due time and alleged, among other things: (1) That the court erred in adjudging the defendant in default, his answer being on file. (2) Defendant and his counsel were absent from the courtroom, at the time the judgment was taken, by accident and excusable neglect. (3) Irregularities in the proceedings of the court by which defendant was prevented from having a fair trial: (a) Adjudging defendant in default when he had an answer on file which pleaded an affirmative defense; no reply having been filed thereto. (b) The petition is fatally defective and will not support a judgment; it shows on its face the cause was barred by the statute of limitations. (c) Judgment is not supported or proved by competent evidence. (d) Defendant had a valid and legal defense stated in his answer, which was not controverted by plaintiff. (e) The cause could not be tried without a jury; the same not being waived by defendant. (4) The judgment is not supported by competent evidence. (5) The judgment is contrary to law.

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This motion, as well as a motion for new trial, was, after due consideration by the court, overruled, and the defendant brings this cause here to reverse said order. At the threshold, we are met with a motion to strike the case-made and brief from the files of this court and to dismiss the appeal, there being many reasons assigned for such action, the first being that the said case-made was not made and served in the time provided by law. In support of this reason, it is urged that the defendant was not given 60 days in which to make and serve the case-made, but that the language of the court found on page 26 of the case-made is that the defendant serve his case-made within 60 days, and that it does not specifically give the defendant 60 days in which to prepare it, it merely providing that it shall be served at some time within the 60 days; that it does not undertake to extend the time for making the case-made for any definite period; and that therefore the case-made should have been made and served within three days from the rendition of the final order. This is not a fair interpretation of the language of the court. Even a casual reading of the record shows that it was the intent of the court, fully understood by the parties, that the defendant was given 60 days in which to make and serve a case-made on the plaintiff for appeal to the Supreme Court, and the rule laid down in *Springfield Fire & Marine Ins. Co. v. Gish*, 23 Okla. 824, 102 Pac. 708, does not apply or govern under the facts of this case.

The second and third ground for dismissal is that the defendant has failed to comply with rules 20 and 25 of this court (38 Okla. ix and x), in that defendant has failed to separately set forth and number the argument, and authorities in support of the point in his assignment of error, etc. There is some merit to this objection, but the discrepancy and shortcoming of the brief of the defendant is not of such magnitude or degree as would warrant us in dismissing the appeal under this ground of the motion.

The fourth reason is that the case-made affirmatively shows on its face that it does not contain all the evidence. In this, counsel for plaintiff are evidently mistaken, and undoubtedly have

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overlooked the averment of the case-made by way of recital, found on page 26, that "the foregoing contains a true and correct statement of the pleadings, motions, orders, evidence, findings and proceedings, upon which judgment was rendered." While this certificate might have been more full and complete, yet to our mind it is sufficient under the statute and holdings of this court.

The last ground urged is for failure to comply with rule 25, *supra*, wherein it is provided that the brief of the plaintiff in error shall contain a statement of facts. There is no merit in this allegation. The brief of defendant, on pages 2, 3, 4, 5, 6, 7, and 8, contains a full and correct abstract and statement of the facts of this case, and, while it is not labeled "Statement of Facts," yet it is a statement as fully and completely as though it was so labeled.

This brings us to the consideration of the case on its merits. The judgment by default was erroneously entered. There can be no judgment by default where there is on file an answer or other pleading of defendant raising an issue of law or fact. Before a default judgment can be properly entered, the answer or other plea must be disposed of in an orderly way by motion, demurrer, or in some other manner. 23 Cyc. 750. In this case there was an answer, filed in due time, consisting of a general denial, and, in addition, specifically challenging the sufficiency of the allegations of the petition by showing that the statute of limitations had run against the alleged cause of action prior to the time the action was instituted. Such pleas are in no wise inconsistent, and the judgment by default was improvidently entered, and no possible advantage could accrue thereunder to the plaintiff, nor could any detriment result therefrom to defendant.

But, without doubt, under the showing made in the record before us, plaintiff was entitled to proceed with the trial, even in the absence of defendant or his attorney. There is nothing in the record that warrants any other conclusion, and the entering of the purported default against defendant was of no consequence one way or the other.

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This brings us to the consideration of the grounds laid in the motion for a new trial. We will consider them all together. The petition on its face shows that the judgment sued on was rendered in the district court of Miami county, Kan., on June 8, 1908; that suit thereon was filed in the superior court of Pottawatomie county, Okla., on December 28, 1910, two years, six months, and twenty days subsequent to the rendition of the judgment in the Kansas court. The judgment was not stayed by supersedeas or otherwise, so far as this record shows. Even though a valid default judgment had been entered against defendant, the judgment cannot be sustained unless the petition, upon which it is based, states a cause of action and contains all those averments necessary to show plaintiff's right of recovery. If the petition shows on its face that the right to sue on the judgment was barred by the statute of limitations, a general demurrer would be sufficient to call the attention of the court thereto. In *M., K. & T. Ry. Co. v. Wilcox*, 32 Okla. 51, 121 Pac. 656, it was said:

"The petition clearly shows on its face that more than two years had elapsed from the date the horses were killed until the filing of the suit. There is no allegation in the petition which takes, or attempts to take, the cause out of the operation of the statute of limitations, and when the petition shows clearly on its face, as this one does, that the statute of limitations had run against the cause of action, it was the duty of the court to sustain the demurrer, especially when no objection to the sufficiency of the plea was made by plaintiff in the court below."

See, also, *Young v. Whittenhall*, 15 Kan. 580; *School Dist. No. 1, Hamilton Co., v. Herr*, 6 Kan. App. 861, 50 Pac. 101.

In *City of Phillipsburg v. Kincaid*, 6 Kan. App. 377, 50 Pac. 1093, it was said:

"The only question in the case is: Does the petition state facts sufficient to constitute a cause of action against said defendant below, the plaintiff in error? The action was brought to recover damages for taking and detaining personal property. The petition alleges that the property was taken November 15, 1891. This action was commenced in the court below July 5, 1895. *There is nothing stated in the petition sufficient to take the cause out of the operation of the statute of limitations* (italics

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ours), and, under the provisions of paragraph 4095, Gen. St. 1895, the demurrer thereto should have been sustained."

While there was no demurrer filed against the petition, yet under the circumstances of the case the answer, specifically setting up the plea of the statute of limitations, was the equivalent thereof and should have been so treated by the court. The answer being on file and no motion made to strike it or properly dispose of it in any other manner, it became and was the duty of the court to scrutinize the allegations of the petition closely, and if the same were insufficient to entitle the plaintiff to the relief sought, or to sustain a judgment, it should have been so found by the court, and the relief sought denied, and, even though the court failed to so scrutinize the petition, it became and was its duty to weigh the evidence introduced under and in support of it, and, if there was no competent evidence reasonably tending to warrant the relief sought, the same should have been denied. Counsel for plaintiff ingeniously urge that there is nothing in the answer to show that defendant was ever present in the state of Oklahoma, and that therefore the plea of the statute of limitations is not open to him. The answer alleges that "he has been an actual and *bona fide* resident of Pottawatomie county, state of Oklahoma, for more than eight years last past and is now a resident in good faith of said county and state, and that said residence has been actual and continued." This, giving it the meaning ordinarily given to language, is a sufficient allegation of residence to sustain the plea as offered, and, in the absence of motion to make more definite and certain or a denial of any sort by plaintiff, it is sufficient. Indeed, under the ordinary rules of pleading, it stands admitted in this case.

The only evidence introduced in support of the petition was copies of the record from the Kansas court. Without considering the competency of these copies, which is properly challenged by defendant in his brief (and which to us appears to be well taken), it is sufficient to say that, in view of the answer and its plea of the statute of limitations on file and properly before the court, and also in view of the fact that the petition is barren of any plea of exception to the statute of limitations, the judgment is

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absolutely void for want of any competent testimony to support the same.

Therefore the court erred in overruling defendant's motion for a new trial, and the judgment should be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

By the Court: It is so ordered.

PERKINS v. BAKER.

No. 3112. Opinion Filed December 23, 1913.

(137 Pac. 661.)

1. **APPEAL AND ERROR—Review of Evidence—Recital in Case-Made.** This court will not examine the evidence on a given subject unless the case-made contains an averment, by way of recital, to the effect that it contains all the evidence introduced at the trial. And this is especially true where the sufficiency of the case-made is properly challenged, and no answer thereto is made by the opposite party.
2. **SAME—Misconduct of Counsel—Presentation Below—Necessity.** To present the question of misconduct of counsel, as making improper statements to the jury in his argument, for appellate review, there must be an objection seasonably made, and an exception properly taken, if it is overruled.
3. **EVIDENCE—Documentary Evidence—Hearsay.** It is not error to exclude from evidence a copy of the enrollment records offered for the purpose of proving the age of a Seminole allottee at the time he executed a warranty deed in January, 1905, especially where no predicate has been laid for the admission of secondary or hearsay evidence, and no other proper or sufficient reason being apparent.
4. **SAME—Affidavit—Proof of Age.** It is not error to refuse admission in evidence of an affidavit of the deceased mother of an alleged minor, unless it is shown that such affidavit was made in good faith, unbiased by any issue between the parties likely to be affected thereby, and made before the litigation was commenced in which such evidence is to be used.
5. **WITNESSES—Impeachment—Conviction of Crime.** Record examined, and held not error to allow a witness to be asked if he had ever been convicted of a crime in the tribal courts of the Seminole Nation.

(Syllabus by Robertson, C.)

Opinion of the Court.

*Error from District Court, Seminole County;
Tom D. McKeown, Judge.*

Action for ejectment by J. A. Baker against J. M. Perkins. Judgment for plaintiff, and defendant brings error. Affirmed.

Crumph, Fowler & Skinner, for plaintiff in error.

J. A. Baker, pro se.

Opinion by ROBERTSON, C. This action in ejectment was brought in the district court of Seminole county in November, 1909, by J. A. Baker against J. M. Perkins. The answer denied the claim of ownership set up and relied upon by Baker, and set up ownership in the defendant, Perkins; Baker claimed by virtue of a deed dated January 4, 1905. It was the contention of the defendant at the trial below that, at the time Baker took his deed to the land in controversy, the grantor therein, Tippie Alberta, was a minor, and, being a Seminole freedman, was not capable of transferring the title to said land, and the deed under which Baker claims was therefore void. The jury returned a verdict in favor of Baker and against Perkins, upon which judgment was entered, and to reverse which this appeal is brought. The principal question in the case, and that upon which the verdict of the jury turned at the trial, was the age of the grantor, Tippie Alberta. There are many assignments of error in the petition; but in the defendant's brief attention is given only to the second, fifth, eighth, ninth, and eleventh, the others being waived.

The second assignment is that "the verdict and judgment rendered thereon in said cause was contrary to and not sustained by the evidence." The plaintiff objects to the consideration of this assignment by this court, for the reason that the case-made does not contain a certificate showing that it contains all the evidence introduced at the trial, and upon which the verdict was rendered and the judgment was entered. A careful examination of the case-made proves this assertion to be correct, and under the uniform holdings of this court we are not at liberty to examine any of the testimony given on a subject, unless the case-made contains the positive averment, by way of recital, to

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the effect that it contains *all the evidence* introduced at the trial. This objection to the sufficiency of the case-made stands before us unanswered, and for that reason we presume the same must be true, and that the record cannot be amended. *Baldwin Lumber Co. c. Sanders*, 39 Okla. 142, 134 Pac. 387, and the cases there cited.

The next assignment of error urged has to do with the alleged improper conduct of counsel for plaintiff in his argument to the jury. Considerable space is taken up in defendant's brief on this subject, and many authorities are cited in support of his contention. Stress was also laid on this purported impropriety at the oral argument had before us; but counsel for the plaintiff insists that this court has no jurisdiction to hear and determine this question, for that no exception was made or saved to the ruling of the trial court on the subject, and that this is not such a matter as can be raised for the first time in this court on appeal. An examination of the record shows (pages 69 to 70) that the following took place:

"By Mr. Fowler: The defendant excepts to the remarks of counsel for the plaintiff.

"By the Court: The jury are admonished to go by the testimony and the charge of the court."

Section 5026, Rev. Laws 1910, provides that an exception is an objection taken to a decision of the court or judge upon a matter of law. Section 5027 provides that the party objecting to a decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term, etc.

In this case, as disclosed by the record, defendant objected to plaintiff's argument, and the court ruled upon the objection. We must presume the ruling of the court was satisfactory to defendant's counsel, else an exception would have been taken thereto. No such exception was taken so far as the record shows, and no complaint that the record is insufficient in that respect has been heard. No request was made that the jury be instructed to disregard the alleged improper remarks of counsel, yet it seems that the court, in effect, voluntarily instructed them to go by the

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testimony and the charge of the court, and this evidently was satisfactory to defendant, as it ended the controversy, and no exception was noted to the failure of the court to rule directly on the objection, nor to the instruction given the jury. *Alexander et al. v. Oklahoma City*, 22 Okla. 838, 98 Pac. 943; *St. L. & S. F. R. Co. v. Davis*, 37 Okla. 340, 132 Pac. 337; *McLain v. State*, 18 Neb. 154, 24 N. W. 720. In 1 Thompson on Trials, sec. 962, the learned author says:

"The more correct view is that such irregularity can only be saved for appellate review by an objection seasonably made, an exception properly taken, if it is overruled, which exception is incorporated in a bill of exceptions, signed and sealed by the presiding judge."

This rule was quoted with approval and followed by the court in *Coalgate Co. et al. v. Bross*, 25 Okla. 244, 107 Pac. 425, 138 Am. St. Rep. 915, in the following language, by Mr. Justice Kane, in the syllabus:

"To present the question of misconduct of counsel in making improper statements to the jury in his argument for appellate review, there must be an objection seasonably made, and an exception properly taken, if it is overruled."

This precludes further consideration, at our hands, of this assignment of error.

It is next urged that the court erred in not permitting the introduction in evidence of a certified copy of the enrollment record, showing the age of Tippie Alberta. In this connection it is asserted that said copy of the enrollment record should have been received in evidence, first, as conclusive evidence of the age of said allottee under the provisions of the Act of Congress of May 27, 1908 (35 St. at L. 312, c. 199, sec. 3); second, as a circumstance tending to show his age; third, as evidence *prima facie* of his age. We cannot agree with counsel's contention in this behalf. The deed challenged was executed in January, 1905, and the age of the allottee in such instances is a fact to be proved as any other fact provable at that time, and the rule of evidence enunciated by the act of Congress, *supra*, does not control. This act of Congress provides a new rule of evidence; not a general rule, but an arbitrary, limited rule for a particular class

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of cases. No predicate was laid at the trial below for the introduction of secondary or hearsay evidence, and at the time the deed was executed the enrollment record, without a predicate for such evidence having been laid, would have been incompetent. Not so, however, had the transaction occurred after the passage of the act of Congress, *supra*.

It was said by Brewer, C., in *Rice v. Ruble*, 39 Okla. 51, 134 Pac. 49:

"While, as has been stated, it is not required that we here decide whether the enrollment records, or a certified copy thereof, would, in such a case as this, be admissible in evidence at all to be considered with other proof, yet it is not amiss, we think, to say that its admissibility, in such cases as this, on the question of age is very doubtful, under the doctrine of *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653."

See, also, *Rice v. Anderson*, 39 Okla. 279, 134 Pac. 1120; *Williams et al. v. Joins*, 34 Okla. 733, 126 Pac. 1013.

We are of opinion, and so hold, that, in the absence of a reason to the contrary, the certified copy of the enrollment records, offered for the purpose of proving the age of a Seminole allottee at the time he executed a deed in January, 1905, is incompetent and hearsay, and that the court did not err in refusing to permit its introduction in evidence. We do not attempt to decide whether or not the same, under any circumstances, would not be competent; but under the facts in this case, no reason or excuse of any kind being offered, and no predicate being laid, we hold the same to be incompetent.

The next point urged is that the court erred in excluding from evidence the affidavit of the mother of Tippie Alberta concerning his age. This affidavit was made on October 11, 1907. The deed, as has been hereinbefore mentioned, was executed in January, 1905. Ordinarily the declarations of a parent concerning the age of his child (and that is the sole effect of this affidavit under consideration) is admissible in evidence if made before the cause of action arose wherein the same is offered. *Darid v. Sittig*, 1 Mart. N. S. (La.) 147, 14 Am. Dec. 179. Wigmore, in his admirable work on Evidence (volume 2, sec. 1480 *et seq.*), declares this principle to be one of the oldest exceptions to the

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hearsay rule, and is known as the rule of necessity; but before such declaration is admissible, even under this rule, it must be shown that the evidence offered by this method is the best evidence of which the case is susceptible, and that the declaration was made in good faith, unbiased by any issue between the parties likely to be affected thereby, and made before the litigation was commenced in which such evidence is to be used. Then, too, ordinarily this class of evidence is admissible only to prove age in *pedigree*, and not age as a *fact*.

It has been held that a witness cannot testify that he heard the mother of a grantor in a deed say that he was an infant at the time of its execution, unless it is first affirmatively shown that the declaration was made *ante litem motam*, and that the declarant is dead. *Hodges v. Hodges*, 106 N. C. 374, 11 S. E. 364; 1 Greenleaf, sec. 131. The question of the age of Tippie Alberta, for the purpose of this case being one of fact, instead of pedigree, was for the jury, and the issues thus formed and submitted, having been resolved in favor of plaintiff on conflicting evidence, will not be disturbed in this court on appeal.

The only remaining assignment is that the court erred in permitting plaintiff, for the purpose of impeaching a witness, to ask him if he had ever been convicted of a crime in the tribal courts of the Seminole Nation.

This court will take judicial notice of the history and government of this nation, as well as of the various subordinate divisions thereof, including that of the Five Civilized Tribes of Indians. We know that the Seminole Nation had an organized form of government, with a judiciary having jurisdiction of the various crimes and offenses, including those involving moral turpitude; these governments and the courts organized thereunder were recognized and fostered by the federal government. We also know that a witness may, for the purpose of impeachment, and as affecting his credibility, be asked whether or not he has been convicted of any crime involving moral turpitude. This sort of examination, however, must be confined to reasonable limits, subject to control by and through a wise discretion of the trial court. In the instant case no abuse of discretion is shown.

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No motion was made by defendant's counsel to withdraw the alleged objectionable matter from the consideration of the jury, or to instruct the jury to disregard the same; hence, if any harm was done, the effect thereof has been waived.

From a careful consideration of the whole case, we are convinced that no error of sufficient magnitude to warrant a reversal was committed, and that therefore the judgment should be affirmed.

By the Court: It is so ordered.

HAILEY *et al.* v. BOWMAN.

No. 3143. Opinion Filed December 23, 1913.

(137 Pac. 722.)

1. **PLEADING—Objection—Demurrer—Motion to Strike.** Where objections to a pleading or a portion of a pleading are based, not on any irregularity connected with its filing, nor on any matter pertaining merely to its form, but on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer, and not by motion to strike from the pleading the allegations attacked.
2. **SAME—Petition—Sufficiency Against General Demurrer.** Where the separate paragraphs of a petition sufficiently state a cause of action for debt and mortgage foreclosure, and in addition thereto it is sought to recover attorney's fees as provided for in the mortgage sought to be foreclosed, a general demurrer to each of such paragraphs should be overruled.
3. **APPEAL AND ERROR—Presentation Below—Review.** Errors alleged to have occurred at the trial in the lower court, unless the same are excepted to and thereafter assigned in the motion for a new trial, and made a part of the record by means of case-made or bill of exceptions, will not be considered on review in this court.

(Syllabus by Sharp, C.)

*Error from District Court, Pittsburg County;
Preslie B. Cole, Judge.*

Action by W. W. Bowman against William E. Hailey and others. From judgment for plaintiff, defendants bring error. Affirmed.

Opinion of the Court.

J. E. Whitehead, for plaintiffs in error.

E. L. Graves and *W. E. Dunaway* (*C. M. Oakes* and *Wm. H. McNeal*, of counsel), for defendant in error.

Opinion by SHARP, C. The first error assigned is based upon the court's action in overruling the defendants' motion to strike from the petition the first, second, and third counts thereof, paragraph 9 of the first count, and that portion of the third paragraph which seeks to recover attorney's fees. This appeal is before us on a transcript of the record only, and without passing upon whether the motion to strike is a part of the record proper, and whether the foregoing questions may be raised upon such proceedings in error, we may say it is obvious that counsel have misconceived the purposes of a motion to strike. Where objections to a pleading are based, not on any irregularity connected with its filing, nor on any matter pertaining merely to its form, but on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer, and not by motion to strike. *First Nat. Bank v. Cochran*, 17 Okla. 538, 87 Pac. 855; *Finch v. Finch*, 10 Ohio St. 501; *Savage v. Challiss et al.*, 4 Kan. 319; *Armstead v. Neptune*, 56 Kan. 750, 44 Pac. 998.

On the same day that the motion to strike was overruled, defendants filed their demurrer, separately charging that neither the first, second, nor third counts of plaintiff's petition stated facts sufficient to constitute a cause of action against any of the defendants. The objection to the sufficiency of the several counts, urged in this court, arises out of the fact that, in addition to a recovery on the several notes, plaintiff sought to recover attorney's fees, provided for by the real estate mortgage given to secure the payment of said notes. The demurrers urged to the separate paragraphs of the petition, however, are general, and do not confine their attack to the allegations concerning attorney's fees, but charge in turn that the several counts failed to state facts sufficient to constitute a cause of action. Where a general demurrer is filed to a petition as a whole, or to any paragraph thereof, if the pleading or the paragraph states a cause

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of action entitling the pleader to some relief, a general demurrer should be overruled. *Hurst v. Sawyer*, 2 Okla. 470, 37 Pac. 817; *Hanenkratt v. Hamil*, 10 Okla. 219, 61 Pac. 1050; *Berry v. Geiser Mfg. Co.*, 15 Okla. 364, 85 Pac. 699; *Cockrell v. Schmitt*, 20 Okla. 207, 94 Pac. 521, 129 Am. St. Rep. 737; *Emmerson v. Botkin*, 26 Okla. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; *Coody v. Coody et al.*, 39 Okla. 719, 136 Pac. 754.

The exact question was before the court in *Savage et al. v. Dinkler*, 12 Okla. 463, 72 Pac. 366. There it was held that a petition which stated a good cause of action for debt and foreclosure of a mechanic's lien, and in addition thereto it was sought to recover an attorney's fee, was not subject to a general demurrer, although the plaintiff was not entitled to recover such fee.

The several paragraphs of plaintiff's petition state a cause of action, and whether or not plaintiff asked a recovery for a larger amount than he was entitled to could not be reached by a general demurrer charging only that the several paragraphs failed to state a cause of action.

The appeal being prosecuted upon a transcript of the record, and not by case-made, the other assignments of error, consisting of motions passed upon by the trial court, including motion for a new trial, the court's rulings thereon, and exceptions taken, cannot be considered. Errors alleged to have occurred in the trial court, unless the same are excepted to and thereafter assigned in the motion for a new trial, and made a part of the record by means of a case-made or bill of exceptions, will not be considered on review in this court. *Muskogee Electric Traction Co. v. Reed*, 35 Okla. 334, 130 Pac. 157.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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EL RENO MUT. FIRE INS. CO. v. SUTTON.

No. 3147. Opinion Filed December 23, 1913.

(137 Pac. 700.)

1. **JUDGMENT—Vacation—Fraud—Perjury.** The obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud within the meaning of subdivision 4, sec. 2567, Rev. Laws 1910.
2. **SAME.** While the weight of authority seems to be to the effect that a court of equity will not arrest the execution of a judgment founded upon false testimony which was considered and passed on by the trial court in the case in which the judgment complained of was rendered, yet in this state the rule is that the intentional production of false testimony will, in a proper case, justify the annulment of a judgment rendered on account of such testimony.
3. **SAME.** Where the unsuccessful party has been prevented from exhibiting fully his case by fraud and perjury practiced on him by his opponent, and it is clear that by reason of such fraud and perjury there has never been a real contest in the trial or hearing of the case, a court of equity may set aside the judgment thus rendered, and grant a new trial.
4. **SAME—Grounds.** Before a court of equity will interfere with a judgment rendered on perjured testimony, and order a new trial, it must be made to appear that the injured party has used due diligence in presenting the matter to the court, and that he is clearly entitled to the relief sought; that the question presented has never been litigated in any court on account of the perjury complained of, and that but for the perjury the question raised would have been fully presented and adjudicated at the former trial; that the question of perjury complained of could not have been litigated at the former trial by the use of due diligence; that the relief sought could not have been obtained by motion or other plea in the action where the judgment was rendered; and that a full and meritorious defense to the action is pleaded, which, on account of the perjury complained of, could not have been presented in the former trial.

(Syllabus by Robertson, C.)

Error from District Court, Washita County;
James R. Tolbert, Judge.

Action by the El Reno Mutual Fire Insurance Company, a corporation, against Mrs. S. E. Sutton to vacate a judgment. Judgment for defendant on demurrer, and plaintiff brings error. Reversed and remanded.

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Will H. Chappell and Brett & Rice, for plaintiff in error.

T. A. Edwards, for defendant in error.

Opinion by ROBERTSON, C. The defendant, Mrs. S. E. Sutton, on the 12th day of February, 1908, in the district court of Washita county, recovered a judgment against the Oklahoma Farmers' Mutual Indemnity Association, now the El Reno Mutual Fire Insurance Company, plaintiff herein, in the sum of \$825, on a fire insurance policy. On the 8th day of February, 1909, the defendant in that case took an appeal to the Supreme Court, where, in February, 1911, the said judgment was affirmed (27 Okla. 450, 112 Pac. 996) and the mandate of the court duly issued and filed in the office of the district clerk of Washita county.

On February 8, 1911, plaintiff filed its petition in equity against the defendant in the district court of Washita county, and sought thereby to set aside and vacate the judgment above referred to, on the grounds that the same had been obtained by fraud practiced by Mrs. S. E. Sutton, the prevailing party, in obtaining the rendition of said judgment, in that the said Mrs. S. E. Sutton committed willful, corrupt perjury in the giving of testimony at the trial of the cause upon a material fact involved in said cause, and that she fraudulently, and for the purpose of deceiving the court and jury, prior to the giving of said testimony, had removed all the goods testified to by her as having been destroyed by fire out of the jurisdiction of the court, and out of the state of Oklahoma, and concealed the same, with the fraudulent purpose and intent of deceiving the court and jury, and to wrongfully recover the judgment sought to be set aside. On the same day notice was served on defendant to the effect that on the 14th day of February plaintiff in error would make application for an injunction enjoining defendant in error from enforcing said judgment until trial of said cause. On June 13, 1911, defendant filed her demurrer to plaintiff's petition. On June 15, 1911, plaintiff and defendant stipulated in writing that plaintiff might amend its petition instanter by attaching thereto copies of the petition, answer, and reply filed in the original cause, wherein the judgment sought to be set aside was rendered, and defendant

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thereupon refiled her demurrer to said petition so amended. The demurrer to said amended petition contains three grounds, the consideration of the first two being rendered unnecessary by the admission on the part of defendant that the matters sought to be raised thereby were not such questions as could be reached by demurrer, hence the only ground of demurrer with which we need concern ourselves at this time is the third, which is: "That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant." This demurrer, coming on to be heard, was by the court sustained, and plaintiff, refusing to plead, elected to and did stand upon said demurrer, whereupon the court dismissed its petition, and entered judgment in favor of the defendant for her costs, to which action of the court the plaintiff excepted, and brings this appeal by transcript of the record to reverse the same.

A consideration of this question requires an examination of the petition. Its material allegations, in substance, are as follows: That the judgment sought to be set aside was obtained by the fraud of Mrs. Sutton, the prevailing party; that she swore falsely on February 12, 1908, at the trial of said cause that the goods insured were all destroyed by fire on April 12, 1907, when in truth and fact said goods were not destroyed by fire, but had been removed out of the state of Oklahoma, and were then concealed in various places in the territory of New Mexico; that these facts were all well known to her, and were unknown to plaintiff, and the court, and jury at the time of the trial; that said facts were material, and, had the court and jury known the truth, the verdict and judgment would have been for the defendant in said trial; that none of said goods were destroyed as alleged, and plaintiff was not liable to pay for same; that said judgment thereby was wrongfully and fraudulently recovered against the insurance company by said false testimony; that said company had no means, at the time of the trial, of ascertaining that the said property had not been destroyed by fire, although it made diligent search by and through its adjuster in that behalf; that on or about April 23, 1909, said insurance company discovered that said goods had not been destroyed by fire, but were then in

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the territory of New Mexico; that immediately upon receipt of such information the said insurance company caused search warrants to be issued and served in New Mexico, and discovered said goods so charged to have been burned, and found the same, and returned them to the state of Oklahoma, and into the jurisdiction of the district court of Washita county, and stored them in the courthouse in said county; that thereafter on the 20th day of June, 1909, the courthouse in said county was burned, together with all the said goods found by said insurance company, which were the property of Mrs. Sutton; that, by reason of the fact of an appeal to the Supreme Court on the judgment complained of, the insurance company was unable to bring its action to set said judgment aside prior to the time of filing the instant case; that the insurance company has at all times exercised due diligence in defending said suit, in searching for said goods, in prosecuting an appeal from said judgment, and in bringing this action to vacate said judgment; that it has a full and complete defense (setting same out in full); and that it has no adequate remedy at law, etc.

This action is brought under the provisions of subdivision 4 of section 6094, Comp. Laws of 1909 (section 5267, Rev. Laws 1910), which reads as follows:

"The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made. * * * Fourth: For fraud, practiced by the successful party, in obtaining the judgment or order."

The foregoing section is a literal copy of section 568 of the Kansas Code of Civil Procedure, and was adopted by this jurisdiction in 1893. It has been frequently held (*Glazier v. Hencybuss*, 19 Okla. 316, 91 Pac. 872; *Barnes v. Lynch*, 9 Okla. 156, 59 Pac. 995; *Farmers' State Bank v. Stephenson*, 23 Okla. 695, 102 Pac. 992; *Fort Produce Co. v. S. W. Grain & Prod. Co.*, 26 Okla. 13, 108 Pac. 386) that the construction placed upon an adopted statute by the Supreme Court of the state from which it is taken carries with it that construction as a part of the statute thus adopted; and therefore the construction placed upon this section of the Code of Civil Procedure by the Supreme Court

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of Kansas prior to the adoption by the territory of Oklahoma came with and was a part of the statute, and such construction is binding upon us. This being true, counsel for the insurance company insists that the question in this case must be decided in its favor, and cites, in support of its contention, the case of *Laithe v. McDonald*, 12 Kan. 340, where it is said:

"Where direct issues of fact are joined upon proper pleadings, and the defendant uses reasonable diligence to be ready to defend the action, but is absent from the trial, and the plaintiff, who is the only witness who testifies at the trial, obtains a judgment by means of his own willful and corrupt perjury, the defendant may have the judgment vacated, and a new trial granted, under the fourth subdivision of section 568 of the Code, 'for fraud practiced by the successful party in obtaining the judgment.'"

This holding of the court was approved in *Green v. Bulkley*, 23 Kan. 136, in the following language:

"By the provisions of section 568 of the Civil Code, if the judgment was obtained by perjury, and diligence is shown, the defendant can obtain a vacation of it," etc.

The Supreme Court of Oklahoma Territory, in *Provine v. Lori*, 6 Okla. 94, 50 Pac. 81, while not passing directly on this question, said, in considering the same:

"In a proceeding to vacate a judgment against a defendant for fraud practiced by the plaintiff in obtaining it, the petition must set forth the judgment complained of, and must also fully state the facts constituting the defense. Unless the facts stated show an existing, valid, and meritorious defense, the petition is fatally defective."

—and quoted with approval from *Laithe v. McDonald*, *supra*, as follows:

"In *Laithe v. McDonald*, 12 Kan. 340, the court vacated a judgment for fraud practiced by the prevailing party, because the party who obtained the judgment committed willful and corrupt perjury, thereby recovering a judgment for \$5,686, when in fact he ought to have obtained a judgment for but \$1,800. However, the court did not place its decision upon the ground that it should be vacated because of *excessive damages*, but placed it squarely upon the fact that the prevailing party had committed willful and corrupt perjury in obtaining the judgment [*italics ours*], and

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upon the further ground that it clearly appeared that a new trial would relieve against a large portion of this judgment."

In *Publishing House, etc., v. Heyl*, 61 Kan. 635, 60 Pac. 317, it was said:

"Judgments fraudulently obtained may be enjoined and vacated in courts of equity; but the assistance of equity may not be invoked to correct errors of law occurring in the course of judicial proceedings."

Section 602 of the Nebraska Code of Civil Procedure provides, "that a district court shall have power to vacate a judgment rendered * * * for fraud practiced by the successful party in obtaining the judgment." This statute was under consideration in *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366, wherein the court says:

"Certainly the obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud, within the meaning of this section of the Code."

And it was there held that a district court has power to vacate a judgment rendered by it after the term at which it was rendered for fraud practiced by the successful party in obtaining the judgment. The court said the cases were not numerous in which a judgment had been vacated, and the defeated party granted a new trial, on the ground that the judgment was obtained by the perjury of the successful party; but this was perhaps because, from the very nature of the case, the existence of the fraud or perjury could not be established otherwise than by trying anew the issue tried and determined in the action in which the new trial was sought, and that neither the equity rule nor the Code authorized the vacation of the judgment after the term at which it was rendered, and granting a defeated party a new trial for fraud practiced upon him, save where the fraud was practiced in connection with the trial.

While in *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846, 87 Am. St. Rep. 474, it was held that, while the weight of authority doubtless was to the effect that a court of equity would not arrest the execution of a judgment founded upon false testimony *which was considered and passed upon by the court or jury in the case in which the judgment complained of was entered, yet*

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in Nebraska the rule followed is that the intentional production of false testimony would, in a proper case, justify the annulment of a judgment rendered on account of such false testimony. The court added that it was not the policy of the law, however, to encourage such actions, that there must be an end to litigation, and that a party could not be permitted to experiment with his case at the expense of the public, etc.

In *Miller v. Miller*, 69 Neb. 441, 95 N. W. 1010, it is said to be the settled rule in Nebraska, under the statute above quoted, that a judgment clearly shown to have been obtained by fraud or false testimony, which it would be against conscience to enforce, will, on application of the unsuccessful party and a showing of due diligence, be vacated.

In *Baldwin v. Sheets*, 39 Ohio St. 624, it was held that a petition alleging that defendants entered into a conspiracy to, and did, testify falsely, and thereby obtained the judgment, the evidence to sustain such allegation having been discovered since the trial, was sufficient, under a statute identical with the one under consideration.

The cases on the subject are not in accord, and it is difficult to deduce a plain and well-supported rule with reference thereto; but this much may, we think, be said to be fairly established, *i. e.*:

“Wherever an issue exists in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counterproof. Where he has an opportunity to do this, and does not avail himself of it, or, though availing himself of it, is unable to overcome the effect upon the court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury, and this has been held to continue to be the rule, notwithstanding the existence of a statute authorizing actions to set aside judgments obtained by means of perjury or subornation of perjury.” (2 Freeman on Judgments [4th Ed.] sec. 489.)

In *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, the rule is stated as follows:

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"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court. * * * these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

In the case at bar it is clearly shown by the petition, and admitted by the demurrer, that not only the allegations of Mrs. Sutton's petition, but the testimony in the suit upon the insurance policy were false and untrue, and were known by her to be false and untrue, and were made by her for the sole and express purpose of defrauding the insurance company; that the latter did not know of the falsity of the allegations of said petition nor of the testimony until after the rendition of the judgment, and after the time for the presentation of the same to the trial court by motion for new trial had elapsed. The fraud, in our opinion, was extrinsic and collateral acts not involving the merits of the case as shown by the pleadings, and which was not an issue inquired about in the original case.

The property was not burned, as she alleged in her petition, but, on the contrary, had been, by her, carried out of the jurisdiction of the court for the express purpose of defrauding the insurance company, and she, knowing the same had not been burned, charged in her petition, and testified in support thereof, that the same had been burned. The insurance company was in complete ignorance of the fact that the goods had not been burned; neither did it know that plaintiff had shipped them out of the state, but, relying on the allegations of plaintiff's petition, prepared and presented a defense on a wholly different theory, and sought only to minimize the amount of a legitimate loss. Hence it follows that there has never been a real contest in the trial or hearing of the case, and that the fraud charged by the insurance company as having been perpetrated by Mrs. Sutton was wholly extrinsic and collateral to the matter involved in the original trial, and that but for such fraud she could not have recovered in any event.

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We are not unmindful of the general rule that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony, for, if this can be done once, it could be done again and again *ad infinitum*. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *Plaster Co. v. Blue Township*, 81 Kan. 730, 106 Pac. 1079, 25 L. R. A. (N. S.) 1237. Nor will relief be granted in equity, unless the fraud complained of is extrinsic to the matter tried in the primary suit. *U. S. v. Throckmorton*, *supra*; *U. S. v. Gleason* (C. C.) 78 Fed. 396; *Bailey v. Willeford*, 69 C. C. A. 226, 136 Fed. 382; *U. S. v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563; *Graver v. Faurot*, 22 C. C. A. 156, 76 Fed. 257; *Lance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374; *Bleakley v. Barclay*, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230. But, as has been pointed out, this case does not come within that rule; but the fraud here complained of is extrinsic to the issue tried in the court below.

There seems to be considerable confusion among the cases as to just how far the courts are justified in going in the granting of the relief prayed for, under the subdivision of the section of the statute relied upon herein. This confusion is due to the fact that no hard and fast rule can be safely enunciated that will fit all cases; each case must, to a marked degree, depend upon its own facts and circumstances, and the granting or refusal to grant relief in such cases is largely a matter of discretion which will seldom be interfered with on appeal.

As one of the general rules governing the subject, however, it may be safely said that no relief should be granted where the matter upon which the claim to relief is founded was litigated in the original action, or where the matter might have been litigated at the former trial by the exercise of due diligence, or where it could have been obtained upon motion in the court which rendered the judgment, unless it appears that the relief sought is in aid of a meritorious claim or defense. In the case under consideration all the foregoing reasons combine in the demand for a new trial.

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The plaintiff has used due diligence in presenting this matter to the court, and it is clearly evident that it is entitled to the relief, because, first, the question presented has never been litigated in any court, on account of the perjury of the defendant, and but for the perjury the question of the loss of the property would have been fully presented and adjudicated at the former trial; second, the question of the perjury of the defendant in the former trial could not have been litigated at the trial by the use of due diligence; third, the relief sought could not have been obtained (owing to lapse of time) by motion or other plea in the action in which the judgment was rendered; fourth, a full and meritorious defense to the action is pleaded, which, on account of the perjury complained of, could not have been presented to the court in the former trial.

To refuse the relief prayed for, and to which plaintiff in error is justly entitled, would be a perversion of justice—a reward on perjury and rascality, and against public morals and good conscience. In such a case this court will not hesitate. The demurrer should have been overruled, and, for the error complained of, the judgment should be reversed, and the cause remanded for further proceedings.

By the Court: It is so ordered.

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No. 3150. Opinion Filed December 23, 1913.

(137 Pac. 711.)

1. **DIVORCE—Grounds—"Extreme Cruelty."** Any unjustifiable conduct on the part of the husband, which so grievously wounds the mental feelings of the wife, or so utterly destroys her peace of mind, as to seriously impair her bodily health or endanger her life, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute, although no physical or personal violence is inflicted or even threatened.
2. **SAME.** False and groundless charges of adultery with divers men, made at intervals during a long course of years, by a husband

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against the wife, constitute extreme cruelty within the meaning of section 4962, Rev. Laws 1910.

3. **SAME—Amount of Alimony—Discretion.** Where a divorce is granted the wife by reason of the fault of the husband, the allowance of permanent alimony rests in the sound judicial discretion of the trial court, and is to be exercised with reference to established principles, and on a view of all the circumstances, such as the husband's estate and ability, at the time the divorce is granted, the wife's condition and means, and the conduct of the parties.
4. **SAME.** An allowance of alimony to the wife, of property approximating in value \$10,000, where the remainder of the husband's estate, not considering life insurance policies maturing at various times in the future, is worth between \$7,500 and \$8,000, where the major portion in value of the property awarded the wife consists of a homestead acquired by the parties jointly during their marriage, and where the wife is given the care, custody, and control of two of the three minor children (the third and oldest child not being provided for in the decree), will not be disturbed on appeal as an unreasonable allowance.

(Syllabus by Sharp, C.)

*Error from District Court, Kay County;
W. M. Bowles, Judge.*

Action for divorce and alimony by Clara B. Hildebrand against E. A. Hildebrand. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Moore, for plaintiff in error.

John S. Burger, for defendant in error.

Opinion by SHARP, C. The first, second, third, and fourth assignments of error involve either the legal sufficiency of plaintiff's petition, or the proof submitted in its support, and may therefore be considered together. The petition charged extreme cruelty in that defendant falsely and maliciously, and without grounds, accused plaintiff of having committed adultery with divers men, at divers times and places, during the last ten years preceding the filing of her petition. Other acts of cruelty, set forth in the petition, unnecessary to be here reiterated, together with the acts of cruelty mentioned, it was charged, caused plaintiff great suffering, mental anguish and pain, worry of mind, and great humiliation, with the result that her health was greatly im-

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paired, and she was rendered almost insane. The facts charged were abundantly proved.

Defendant, a widower 40 years of age, married plaintiff, who was at the time of her marriage 21 years of age, at Matfield Green, Kan., on the 5th day of May, 1892. As a result of their union three children were born, aged at the date suit was brought, respectively, sixteen, thirteen, and eleven years. The first step in the family discord was when plaintiff visited her parents about three months after her marriage, and was falsely accused by her husband with having clandestinely met a gentleman acquaintance, though no criminal intimacy was in this instance charged. About two years after their marriage, they moved to Oklahoma, where defendant made homestead entry on a claim in Kay county. Shortly thereafter defendant became jealous of one James Patterson, who had called at their home on some neighborly errand. In 1902 defendant accused plaintiff of being criminally intimate with a hired hand, who was at the time in their employ. At the time defendant had left plaintiff at home sick in bed, with no one to attend her. He threatened to kill plaintiff on this occasion, if he could only be positive of her guilt. On account of defendant's said conduct on this occasion, plaintiff became melancholy, nervous, and physically ill. Plaintiff was also jealous of the local school-teacher, who occasionally called at the Hildebrand home to see the defendant, who was clerk of the school board. Joe Schmidt, a neighbor, was another of whom defendant was jealous. Dr. Elliott, at one time the family physician, was another toward whom he manifested much jealousy, charging plaintiff with having drunk whisky with him. Referring to a visit by plaintiff to her old home in Kansas, where for several months she was under a physician's care, she stated that:

"Mr. Hildebrand had just worn me out by sexual abuse, just completely worn me out, until I was forced to beg him to let me alone, and he would not do it, and I finally became hysterical and cried, and he called me a strumpet and said that while I had been at my old home I had been intimate with at least a dozen men and had spent that winter around the Old Central Hotel, and that he would not live with me again to save my soul from hell."

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Wille Wildgrube, a neighbor boy, also came in for a share of his insane jealousies; with him he accused plaintiff of being unduly intimate. Kelley Kersey and the Johnson boys were others toward whom defendant formed an aversion on account of his ungrounded suspicions. On one occasion, when two young men came to the home to call on a lady guest visiting them, defendant, upon his return, flew into a violent rage, broke a panel out of the door, and caused a disturbance. Dr. Conway was another with whom defendant charged plaintiff with having had criminal relations, saying that he would bet that plaintiff had slept with him 50 times. Dr. Gearhardt was still another with whom plaintiff was charged with having been criminally intimate. The evidence shows not the slightest ground whatever for any of these brutal and indefensible charges. They stand uncontradicted, save in the uncorroborated and very unsatisfactory evidence of the defendant himself. Plaintiff, at the time of her marriage, was a school-teacher, and, the evidence unmistakably shows, a woman of some considerable refinement. The effect upon her of these long years of continuous ill treatment is perhaps best told in her own language. The day before the birth of one of her children, some question about what physician would be called arose. She says that defendant assumed to be indignant at Dr. Elliott on some account, and said that he would show him that they did not need to have a doctor, and that "when I was taken sick on the 30th day of December, on a very cold night, we were alone and Mr. Hildebrand—well, I offended his sensibilities with my sickness, his olfactory nerves were so offended and he spoke to me so brutally that my heart was nearly broken, and I was obliged to go out in a cold room and stay there frequently for intervals of a half an hour, and it was so cold in there that water spilled on the floor was frozen, and it made my sickness unnatural, and I suffered a great deal, and when I cried he raised up and says, 'Well, for God's sake, what are you belitering for?' he says, 'if you can't sleep, there isn't any reason why you should keep the whole house awake;' and after that of course I stifled my groans until after daylight." Harry was born the next afternoon, no physician being sent for during her labors.

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On another occasion, while plaintiff was confined to her bed with illness, a neighbor boy dropped in to inquire of her condition. The conduct of defendant when he learned of this fact is explained by plaintiff thus wise:

"When Mr. Hildebrand found out, he doubled up his fist and shook it in my face, oh well, within a half an inch of my eyes. I thought he was going to strike me, and still he would not have made— Q. State what he said. A. Well, he said that if—the first time he met that God damned son of a bitch, he was going to walk up to him and strike him between the eyes, he didn't care if he knocked him dead; he wouldn't even listen to my explanation about him not being there—he walked out the door and slammed it after him, and then a short time after that a deputy came from Ponca City to attach some property of ours and sell it for a debt, and Mr. Hildebrand—I was still sick in bed and couldn't get up—Mr. Hildebrand said he was going away, he hitched up and was getting ready to drive away, and he came to the door and he says, 'If that damn deputy comes out there today to sell these hogs,' he says, 'don't you let him step his foot on this place.' I said, 'Well, papa, how can I help myself?' He says, 'You can go to hell then,' and he went that way."

Referring to the birth of the youngest son, the witness testified:

"The next sickness that I remember was when my boy—after my boy Richard came, my youngest son, and I sent for my sister Ruby to help me and it was always the same trouble about the smoke, and he never gave me even a kind word. He would speak about the dirt and things weren't clean enough, and I laid around in the dirt like a shoat; if I looked bad, he said I looked like a cow that had lost her calf; that is the kind of remarks he made to me all the time; and my house was just barren of everything. We had been in Oklahoma long enough to begin to get things; we had raised some good crops and had money, but it all had to go to pay old debts. I didn't even have clothes, and I didn't go to town more than twice a year to buy anything. If I did, he didn't give me any money to buy anything."

On five occasions, when plaintiff was ill, caused by miscarriages, defendant would say that he didn't believe there was anything the matter with her, and if there was, "It didn't belong to him."

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It was shown that for over ten years plaintiff had charge of the farm, defendant spending all of his time, except Saturday nights and Sundays, in Ponca City, where he was engaged in the telephone business. Since moving to Oklahoma, plaintiff had done almost all kinds of manual labor, such as painting the house, inside and out, herding the cattle, shoveling wheat, gardening, and cleaning out the stable, and had contributed largely toward their property accumulations. During all of this time plaintiff, on account of defendant's conduct, was ostracized by her neighbors, and had no social companionships, but patiently bore the studied insults and imprecations heaped upon her by her husband, who for ten years, save from Saturday night until Monday morning, made his home at the leading hotel in Ponca City, and traveled during the latter years in an automobile, while his wife performed her menial labors on the farm. As stated by plaintiff:

"So far as my relations with my husband have been concerned, it has been one long bitter period of just misery for something like fifteen or sixteen years."

Much more evidence, some of which is even more damning than that mentioned, was produced at the trial. It was shown that defendant repeatedly stated that he cared nothing for his wife or their three children, and that when he married her he needed a home and a housekeeper, and picked plaintiff out from among the other girls of Matfield Green for that purpose.

Does the petition charge, and does the evidence show, extreme cruelty, within the meaning of our divorce statute (section 6172, Comp. Laws 1909; section 4962, Rev. Laws 1910)? The law at one time required proof of physical violence where extreme cruelty was relied upon as a ground for divorce; but the later and better considered cases have repudiated this doctrine, as taking too low and sensual view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either spouse, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health or endanger the life of the other, or such as utterly destroys the legiti-

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mate ends and objects of matrimony, constitutes extreme cruelty under the statute, although no physical or personal violence be inflicted or even threatened. *Beach v. Beach*, 4 Okla. 359, 46 Pac. 514; *Barker v. Barker*, 25 Okla. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909; *Lyon v. Lyon*, 39 Okla. 111, 134 Pac. 650; *Gibbs v. Gibbs*, 18 Kan. 419; *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; *Avery v. Avery*, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 522; *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277; *Rowe v. Rowe*, 84 Kan. 696, 115 Pac. 553.

False charges of adultery, made by the husband of the wife maliciously and without probable cause, constitute legal cruelty. To a pure and virtuous woman, in no way could a husband show his cruelty and inhumanity more completely than by false and unfounded charges of a want of chastity; and, where the charges are repeated and continued for a long term of years, and embrace many alleged facts of adultery, which, if true, would make the wife a being little better than a common prostitute, the offense is aggravated almost beyond the pale of human forgiveness. When a husband descends to such a level, and becomes so vicious and depraved, and so completely forgetful of the sanctity of the marital relation, then indeed, in his case, the institution of matrimony fails. The law does not require that a good woman further continue to cohabit with such a type. Human law requires no such sacrifice, and the fact that defendant did not use a bludgeon will not enable him to defeat the wronged wife, in a suit for legal separation and alimony. Blows often wound less deeply than words, and in this age of Christian civilization when the wife is not as a beast of the field, but instead the queen of the home, she is entitled of right to the husband's unfaltering love and respect, and where this is denied her, where there is sufficient evidence, to the protection of the courts. We find little patience with the insistence of the once semibarbaric rule that afforded an avenue of escape to the injured wife only where physical violence was inflicted upon her. *Beach v. Beach*, 4 Okla. 359, 46 Pac. 514; *Barker v. Barker*, 25 Okla. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909; *Mathewson v. Mathewson*, 81 Vt. 173.

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69 Atl. 646, 18 L. R. A. (N. S.) 300, and note; *Miller v. Miller*, 89 Neb. 239, 131 N. W. 203, 34 L. R. A. (N. S.) 360, and note; *MacDonald v. MacDonald*, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; 14 Cyc. 606.

The findings of the court are that the allegations in plaintiff's petition are true. These allegations assign extreme cruelty as a ground of divorce, and on appeal we are not concerned with the reason given for reaching the correct conclusion. The petition sufficiently stated a good cause of action, and was supported by the great preponderance of the evidence. The court could not have done otherwise than to find in favor of the plaintiff.

Finally, it is urged that the court erred in its decree awarding alimony in property valued at over \$10,000. The statute authorizing an award of alimony (section 4969, Rev. Laws 1910) provides that when a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time the decree is rendered, which alimony may be allowed to her either in real or personal property, or both. The plain letter of the statute, therefore, gave to the trial court the right to make such an award as it thought reasonable in the light of the evidence adduced. The rule announced is in full harmony with the very general rule that the allowance of permanent alimony is a matter of sound judicial discretion, to be exercised with reference to established principles, and upon a view of all the circumstances of each particular case; such as the estate and ability of the husband, the condition and means of the wife, and the conduct of the parties. *Adams v. Adams*, 30 Okla. 327, 120 Pac. 566; *Viertel v. Viertel*, 212 Mo. 562, 111 S. W. 579; *McConnell v. McConnell*, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1094; *Huffman v. Huffman* (Ind. App.) 101 N. E. 400; *Call v. Call*, 65 Me. 407; *Winkler v. Winkler* (Miss.) 61 South. 1; *Wyrick v. Wyrick*, 88 Neb. 9, 128 N. W. 662; *McCarthy v. McCarthy*, 143 N. Y. 235, 38 N. E. 288; *Blair*

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v. Blair (Utah) 121 Pac. 19, 38 L. R. A. (N. S.) 269; *Harris v. Harris*, 31 Grat. (Va.) 13.

The evidence showed that the value of the farm on which plaintiff resided, and had charge of for ten years, was between \$9,000 and \$10,000. Other property covered by the decree amounted in all not to exceed \$1,000 additional. The defendant was the owner of dividend paying stock in the American Telegraph & Telephone Company of the value of approximately \$5,000, in addition to which he had about \$1,000 on deposit in a bank, and owned real estate in Oklahoma City, Ponca City, and Braman, worth approximately \$1,400, and life insurance policies amounting to \$5,000, one policy for \$1,000 maturing the year following the trial, one one or two years later, and the others having some time to run. He also owned an automobile, and was drawing a salary from the Pioneer Telephone & Telegraph Company of \$75 per month. The decree gave to the plaintiff the care, custody, and control of the two younger children, Harry and Richmond; and, considering this fact and the further fact that plaintiff by her long years of arduous labor had contributed largely to the property accumulations, we think that no abuse of discretion in the matter of fixing the amount of the alimony is made to appear.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

ST. LOUIS & S. F. R. CO. v. SMITH.

No. 3169. Opinion Filed December 23, 1913.

(137 Pac. 357.)

1. **RAILROADS—Killing Trespassing Animals—Presumption of Negligence.** In an action against a railroad company for killing trespassing animals, negligence will not be presumed, in the absence of statute, from the mere fact of accident, which is as consistent with the presumption that it is unavoidable as it is with negligence.
2. **SAME—Liability.** In the absence of negligence, a railroad company is not liable for animals injured or killed, when they come

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upon the track at a place where it is not required by law to be fenced, such as station grounds.

3. **TRIAL—Direction of Verdict—Evidence—Negligence.** In an action against a railroad company for the negligent killing of stock, where the plaintiff's right of recovery depends upon defendant's negligence, and where there is no evidence tending to prove negligence, and no circumstance from which negligence might be reasonably inferred, it is the duty of the court to direct a verdict in favor of defendant.

(Syllabus by Sharp, C.)

*Error from County Court, McCurtain County;
T. J. Barnes, Judge.*

Action by T. W. Smith against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans, R. A. Kleinschmidt, E. H. Foster, and Stephenson & Shaffer, for plaintiff in error.

Opinion by SHARP, C. Of the several assignments of error urged, it will be necessary to consider only the action of the court in overruling defendant's motion for a peremptory instruction. At the time of the accident which resulted in the death of plaintiff's mule, the owner was living in the little town of Duval, about 75 yards distant from the railroad station platform, and had turned the mule out to permit it to graze in the adjoining woods pasture. On the same afternoon the mule was struck by an east-bound passenger train, and, as a result of the injury sustained, died a short time thereafter. The undisputed evidence shows that the animal was struck by the engine at the station platform. Plaintiff's amended petition charges that the animal's death was due to the negligence of the defendant in the operation of its train, and further charged that no fence had been erected by the railroad company where the injury occurred. The latter allegations, if indeed as alleged it could be charged as an act of negligence, was eliminated by the court's charge to the jury, so that the only ground upon which the verdict was permitted to stand was that the train at the time of the injury was being negligently operated, as the trial court was clearly correct in its instruction that the railroad company was not required

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by law to fence its right of way at station grounds. Section 1389, Comp. Laws 1909 (Rev. Laws 1910, sec. 1435); *St. Louis & S. F. R. Co. v. Brown*, 32 Okla. 483, 122 Pac. 136.

We have read the testimony very carefully, and fail to find any evidence tending to show any negligence on the part of the employees of the railway company. Four eyewitnesses testified concerning the accident, two on the part of the plaintiff, and two on the part of the defendant. C. B. Gardner, for plaintiff, testified that he saw the mule on the track at the dirt road crossing a short ways, probably 30 or 40 yards, west of the platform, at which time the animal was running down the track, and was but four or five feet in front of the engine, when the witness turned his attention elsewhere. When he next saw the mule, she was walking away from the track, limping as if injured. Bertha Davlin, a daughter of plaintiff, testified that she did not see the mule when it went on the track, but saw it running away from the train as it approached; that it ran probably 30 yards before being hit; that the train was running pretty fast, but whistled, she thought, for the station; that the dirt road crossing was about 35 or 40 yards west of the platform; that she could not say how fast the train was running; that she saw the train hit the mule. On behalf of defendant, J. W. Bateman testified that at the time of the accident he was at the commissary store near by, and saw the mule walking down the track, and that when the train struck her it pushed her down, and that she afterwards got up and walked towards the store; that it seemed that the mule was "just shoved along on her four feet." Joe Goodman, for the defendant, testified that he was standing about 200 yards south of the railroad when he saw the mule on the railroad track; that the train ran against the mule and "pushed her along a little bit and then stopped"; that the mule got up and "fed on off"; that the mule was east of the dirt crossing when she was struck. We do not consider this testimony sufficient proof of negligence. It proves that the animal was struck and injured by the railroad company's engine and nothing more. From all the evidence, it is clear that the mule, which had that day been negligently turned loose by its owner, adjacent to the unfenced station grounds, had

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wandered on the track and was struck and injured; that it got on the track at a point not to exceed 35 or 40 yards from where the train stopped near the station platform.

Negligence is not to be presumed from the mere fact of injury, which is as consistent with the presumption that it was unavoidable as it is with negligence, and there must be some evidence that the accident could have been avoided with proper diligence and precaution. *Stern et al. v. Michigan Central Railroad Co.*, 76 Mich. 591, 43 N. W. 587.

Plaintiff's mule was unlawfully at large, and was a trespasser upon the tracks of the defendant company, and in such case, as was said in *St. Louis & S. F. R. Co. v. Brown*, *supra*, the correct rule is that the railroad company is required to exercise only ordinary care to avoid injuring trespassing animals after they are discovered on or in dangerous proximity to the track. *Atchison, T. & S. F. Ry. Co. v. Davis & Young*, 26 Okla. 359, 109 Pac. 551; *Missouri, K. & T. Ry. Co. v. Savage*, 32 Okla. 376, 122 Pac. 656; *Atchison, T. & S. F. Ry. Co. v. Ward*, 32 Okla. 187, 120 Pac. 982; *St. Louis & S. F. R. Co. v. Little*, 34 Okla. 298, 125 Pac. 459; *St. Louis & S. F. R. Co. v. Hardesty*, 36 Okla. 682, 129 Pac. 739; *Memphis & Little Rock R. Co. v. Kerr*, 52 Ark. 162, 12 S. W. 329, 5 L. R. A. 429, 20 Am. St. Rep. 159. In the absence of negligence, a railroad company is not liable for animals injured or killed, when they come upon the track at a place where it is not required by law to be fenced, such as depot or station grounds. *International & Great Northern R. Co. v. Dunham*, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; *Moser v. St. Paul & D. R. Co.*, 42 Minn. 480, 44 N. W. 530; *Bechdoldt v. Grand Rapids & I. R. Co.*, 113 Ind. 343, 15 N. E. 686.

That the mule was struck within 30 or 40 yards of where it got on the track; that the whistle was sounded and the train quickly brought to a stop at or near the platform; together with the manner in which the animal was struck—all tended to negative, rather than prove, negligence. In the absence of any evidence tending to prove negligence, or where from the evidence negligence may not be reasonably inferred, it is the plain duty

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of the court to direct a verdict in favor of the defendant. *Baker v. Nichols & Co.*, 10 Okla. 685, 65 Pac. 100; *Richardson v. Feller*, 9 Okla. 513, 60 Pac. 270; *Edmisson v. Drumm-Flato Co.*, 13 Okla. 440, 73 Pac. 958; *Cooper v. Flesner*, 24 Okla. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; *Atchison, T. & S. F. Ry. Co. v. Henderson*, 27 Okla. 560, 112 Pac. 986; *St. Louis & S. F. R. Co. v. Webb*, 36 Okla. 235, 128 Pac. 252; *St. Louis & S. F. R. Co. v. McClelland*, 36 Okla. 573, 128 Pac. 1081.

No brief has been filed in this court on the part of the defendant in error. In our opinion the plaintiff wholly failed to make out a case involving the legal liability of the company, and the judgment of the trial court should be reversed.

By the Court: It is so ordered.

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3173. Opinion Filed November 18, 1913.

Rehearing Denied December 23, 1913.

(137 Pac. 103.)

1. **APPEAL AND ERROR—Objections Below—Sufficiency—Admission of Evidence.** Simply objecting to the admissibility of evidence, without assigning the statutory grounds named in section 5070, Rev. Laws 1910, or any other ground of objection, is not such an objection as will cause this court to review the action of the trial court in overruling the purported objections.
2. **MARRIAGE—Existence—Question for Jury.** The existence of facts essential to a valid marriage is to be determined by the jury trying the case.
3. **SAME.** It was within the province of the jury to say whether a marriage was to be inferred from cohabitation and reputation.
4. **SAME—Cohabitation and Reputation—Indians.** Cohabitation and reputation do not constitute marriage, but only evidence tending to raise a presumption of marriage from circumstances. In any case the cohabitation must not be meretricious, but matrimonial, to raise the presumption.
5. **SAME—Presumption.** Such presumption of marriage does not arise where it is not shown that there was a recognition of the

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marriage relation by the parties and a holding out of each other as husband and wife respectively.

(Syllabus by Sharp, C.)

*Error from District Court, McIntosh County;
Preslie B. Cole, Judge.*

Action by Bettie Segro against Eli Segro and Willie Segro, minors under the age of fourteen years, and B. B. Bray, Oscar Easley, Claude Bray, Frank Shepard, W. M. Linley, Lewis Gray, and J. E. Smith, tenants of said above-named defendants. From a judgment in favor of plaintiff, defendants H. M. Fender, administrator of the estate of Eli Segro (who died after the institution of suit), and Willie Segro, through his guardian *ad litem*, H. M. Fender, bring error. Affirmed.

Charles Whitaker, W. C. Franklin, and P. J. Carey, for plaintiffs in error.

Charles A. Cook and Fred P. Branson, for defendants in error.

Opinion by SHARP, C. On the 12th day of September, 1910, plaintiff brought suit against the above-named defendants to recover the possession of 360 acres of land in McIntosh county. It was alleged in plaintiff's petition that she was a duly enrolled full-blood member of the Creek Tribe of Indians, and that of the lands in question 120 acres was allotted to her father, Tom Segro, 120 acres to her brother, Chepahnoche Segro, and 120 acres to her sister, Susan Segro; that each of said allottees was dead; and that plaintiff was the sole surviving heir at law of the said decedents, each of whom died intestate. On the part of the defendants, Eli and Willie Segro, it was contended that they were the children of Tom Segro, and his sole surviving heirs at law, as well as the sole surviving heirs at law of Chepahnoche Segro and Susan Segro, deceased.

No objection is made to the court's instructions to the jury; the only errors assigned being the admission of evidence on the part of the plaintiff and the claim that the verdict of the jury is not supported by the evidence.

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While the witness Louisa Gray was on the stand, she was asked the following, among other, questions: "What relation did Tom Segro have to Sarah Segro?" "Did Tom and Sarah hold themselves out to the community as man and wife?" These questions were each objected to by counsel for defendants, but no grounds of objection were assigned. Our statute controlling the examination of witnesses provides that where any party desires to object to any question put to a witness, either before a court or tribunal or upon the taking of depositions upon notice, the ordinary objections of incompetency, irrelevancy, or immateriality shall be deemed to cover all matters ordinarily embraced within such objections, and it shall not be necessary to specify further the grounds of such objections or to state the specific reasons whereby the question is so objectionable; but the court or opposing counsel may inquire of the objector wherein the question is so objectionable, and the objector shall thereupon state specifically his reasons or grounds for such objection. Rev. Laws 1910, sec. 5070. This statute became effective March 16, 1905. Sess. Laws 1905, p. 327. Prior to its adoption, it had been held that this court would not as a general rule consider objections to the introduction of evidence, unless such objections were made to the trial court at the time the testimony was offered, and that the objections made must be sufficiently certain and definite to advise the court of the specific grounds of objection.

In *Long Bell Lumber Co. v. Martin*, 11 Okla. 192, 66 Pac. 328, the objection made to the introduction of a deed was upon the grounds of incompetency, irrelevancy, and immateriality, and it was held that the objection thus made in general terms was not sufficient to call the attention of the trial court to the objection urged on appeal, that it did not appear that the grantor had authority to execute the deed as an attorney in fact. In *Enid & Anadarko Ry. Co. v. Wiley et al.*, 14 Okla. 310, 78 Pac. 96, it was said that an objection that the evidence was "incompetent," without specifically stating the grounds upon which the objection was based, was too indefinite to present any question to the trial court. In *Conklin v. Yates et al.*, 16 Okla. 266, 83 Pac. 910,

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it was held that an objection to the introduction of testimony should state the precise grounds of objection.

Such was the law at the time of the enactment of the foregoing statute. It would be doing violence to the language of the act and would be a grave injustice to trial courts and opposing counsel to permit an attorney to simply object and afterwards on appeal elaborate upon the grounds of his objection. If there be reason for an objection, it should be stated at the time the objection is made; at least the very liberal requirement of the statute must be observed, before error in the admission of testimony can be urged on appeal. The exact question does not appear to have been before this court under the present statute, though attention was called to the statute in *Midland Valley Ry. Co. v. Ezell*, 36 Okla. 517, 129 Pac. 734; but it was before the Criminal Court of Appeals in *Price v. State*, 1 Okla. Cr. 358, 98 Pac. 447, where it was said by Justice Furman, in a case where a like objection was made:

"Whatever this court may think upon this subject, we are bound by the statute above quoted. It will be seen that the counsel for defendant simply said, 'Objected to.' This does not comply with the statute, and therefore does not amount to any objection. The better and the safer practice is to point out the specific objection relied upon. But the objection must at least go as far as the statute provides; otherwise it cannot be considered by this court. We are not willing to relax the rules relating to objections to evidence any further than the statutes require us to do. So we will not consider this matter, holding that no legal objection was made."

The rule is one of general application and is announced in 38 Cyc. 1378, as follows:

"The general rule is that an objection to evidence must state the specific grounds on which it is based; that an objection which states no grounds therefor will not suffice. This rule is so well settled, and has been applied with such frequency, that the citation of authorities is almost useless. Its operation is the same whether the evidence is oral or documentary, or whether the objection is to the form or substance of a hypothetical question asked an expert."

While the rule is there stated perhaps somewhat broader than authorized by our statute, in the present case, where no ob-

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jection whatever was given, it announces a rule in full harmony with our view of the law.

We think there was sufficient evidence to warrant the verdict returned by the jury. The witness Louisa Gray, on behalf of the plaintiff, testified that Tom Segro had four children by his first wife, Anna; that of his marriage to Sarah one child, Bettie, was born; that these were the only children that Tom had at the time of his death; and that she had known him for a long time, ever since he was a boy, during the greater part of which time they lived near each other. The testimony of Vacey Sevier, though a half-sister of Eli and Willie, was of little, if any, value as an aid to the jury in determining the character of the relationship that existed between Tom Segro and Julia Beavers. Kate Vann, being asked whether Tom and Julia lived together as husband and wife, stated that she did not know they were ever married, and being further asked: "Q. Did they ever live together as husband and wife?" answered, "A. I suppose so; that's what they claim." She testified further that Tom would go to Julia's house and sleep there and get wood for her pretty near every night, and that this was about two or three years before Eli, the oldest child, was born; that she (the witness) raised Eli, and that Tom Segro was his father and treated him as his child; that Tom and Julia lived together. On cross-examination she testified that, at the time Tom chopped wood for Julia, he had a home across Gray's creek, but that he would go there and sleep with Julia and chop wood for her, and then go back; that Tom kept this up until he died. She testified further that Julia Beavers was a Creek freedwoman. Vacey McNac, an enrolled freedwoman, and half-sister of Eli and Willie, testified that she was a daughter of Julia Beavers and lived with her aunt, and that, before moving, her mother and Tom Segro lived together as husband and wife; that of nights Tom would stay with her mother, and had been doing so for a long time, beginning before Eli and Willie were born. This witness was an enrolled freedwoman and did not know her own age. She testified that Eli and Willie were enrolled as freedmen, and that her mother was enrolled under the name of Julia

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Beavers; that the farm where Tom Segro lived was about two miles from where her mother lived; that, during the time Tom was visiting her mother, the latter had a child by one Thomas Adkins; that she did not know whether her mother had a child named Smith.

The Creek law of marriage and divorce was neither pleaded nor proved; nor was there testimony offered as to any tribal customs, pertaining to marriage or divorce among the Creeks, save that Willie McComb, a former member of the Supreme Court of the Creek Nation, testified that, according to the Creek customs, the wife at marriage did not change her former name, and the children were given but one name.

The jury's verdict could only have been reached through a belief that Julia Beavers and Tom Segro were not shown to have been married under either the Creek laws or customs at the time controlling and in force in the Creek Nation. The mere fact that Tom, who at or about the time had a living wife, was maintaining relations with Julia Beavers was far from conclusive evidence of the fact that he and Julia were ever married; and the testimony offered to prove marriage to Julia is not of that character that is calculated to satisfy either court or jury. An irregular, limited, or partial cohabitation is not sufficient to create a presumption in favor of marriage. It must be continuing and complete and such as is usual between persons lawfully married. There are a number of circumstances, shown by the testimony of these witnesses, that cast a serious doubt upon the all-important fact of a marriage between the putative father and Julia. Tom Segro was a full-blooded Creek Indian; Julia Beavers was a Creek freedwoman, and Eli and Willie enrolled Creek freedmen. The evidence mainly tends to show that Tom would go to Julia's house at night and sleep with her, although there is evidence that he made some provision for her and her children, Eli and Willie. At the same time, Julia had another child by one Thomas Adkins, who took his father's name. In one place Vacey McNac testified that the Adkins child was older than Eli and Willie, and in another she states that he was younger. The nature of the relationship existing between Tom and Julia was

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a question of fact for the jury. If that relationship was meretricious, and if under the tribal laws Julia and Tom were not husband and wife, plaintiff's right to recover must stand, for there can be no reasonable question, from the testimony, but that Tom Segro and Sarah were husband and wife, and that the plaintiff Bettie was the legitimate offspring of their union. The issue whether Tom and Julia were ever married was submitted to the jury, and the effect of its verdict was to find that the relationship that existed between Tom and Julia was adulterous, and that no rights to the property in controversy could be acquired by the progeny.

The position of counsel that the jury capriciously disregarded the evidence is therefore, we think, not well taken. It is difficult to establish a rule which will regulate and limit the discretion of a court or jury in the degree of credit to be given to the testimony of witnesses. Much must depend on the particular circumstances of each case. While juries may not arbitrarily disregard the uncontradicted testimony of disinterested witnesses of fair fame, where it contains no inherent improbability, yet where it is incumbent upon a litigant to affirmatively prove a given state of facts, and the evidence introduced for that purpose is lacking in probative value and of the character we have seen, it is within the province of the jury to consider it as insufficient and to find against the one asserting the claim.

Marriage, it is true, may be proved by circumstantial evidence; and, since the presumption is in favor of marriage and against concubinage, the fact that a man and woman have openly cohabited as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances and those who come in contact with them, may give rise to a presumption that they have previously entered into an actual marriage, although there may be no direct testimony to that effect. The existence in fact of a marriage, and the existence of facts essential to a valid marriage, are questions for the jury, and it is within the province of the jury to say whether

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a marriage is to be inferred from cohabitation and reputation. *Doe v. Roe et al.*, 2 Houst. (Del.) 49; *Mickle v. State* (Ala.) 21 South. 66; *Apong v. Marks et al.*, 1 Hawaii, 83; *Jackson et al. v. Jackson*, 80 Md. 176, 30 Atl. 752; *Turner v. Williams*, 202 Mass. 500, 89 N. E. 110, 24 L. R. A. (N. S.) 1199, 132 Am. St. Rep. 511; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609; *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551; *Richard v. Brehm*, 73 Pa. (22 B. F. Smith) 140, 13 Am. Rep. 733; 26 Cyc. 898.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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No. 3203. Opinion Filed December 23, 1913.

(137 Pac. 694.)

SPECIFIC PERFORMANCE—Vendor and Purchaser—Rescission of Contract—Remedies of Vendor. W. sold S. some city lots; they entered into a written contract in which S. agreed to pay for the lots on the installment plan, he giving his promissory notes, due monthly, for the deferred payments, he also going into possession. W. agreed to convey when all payments should be completed. The contract contained many other provisions, among which was one to the effect that, in case of default on the part of S. in the payments, W. might keep all money paid, not as a penalty for the breach of the contract, but as liquidated damages for the use of the premises. S. decided to repudiate the contract, and refused to make payment of installments. W. sued on the past due notes in justice court. **Held:**

(a) That such an action would lie in W.'s favor.

(b) That such contract could not be rescinded except by consent of both parties.

(c) That W., in addition, might have specific performance as against S., but that he was not compelled to resort to that remedy before enforcing payment, in a court of law, of the unpaid installment notes.

(d) That W. is not confined to one action for damages for breach of contract, but that that part of the contract providing for the installment notes was an independent and not a dependent or concurrent covenant, and, as such, could be enforced in an independent action.

(Syllabus by Robertson, C.)

Error from County Court, Oklahoma County;

John W. Hayson, Judge.

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Action by J. L. Wallace against D. M. Shelton on a promissory note. Judgment for plaintiff, and defendant brings error. Affirmed.

R. E. Gish and Dumars & Vaught, for plaintiff in error.

J. V. Cabell, for defendant in error.

Opinion by ROBERTSON, C. On June 30, 1910, D. M. Shelton and J. L. Wallace made and entered into the following contract:

"Contract with J. L. Wallace for lots in McCann's South Highland Addition to Oklahoma City, Oklahoma. I hereby contract for the purchase of Lots 35, 36, 37, 38, 46, 47, 48 in Block No. 16 in McCann's South Highland Addition to Oklahoma City, Oklahoma, on the following terms and conditions: The price of each lot shall be \$162.50 which I agree to pay as follows: \$40.00 cash in hand paid to agent, receipt of which is hereby acknowledged, and \$5.00 per lot each month until the full amount of the purchase price is paid in full at the office of The State Bank at Capitol Hill, Oklahoma. The buyer hereby on his or her part agrees that if default is made on any payment herein provided for that then all payments heretofore made shall be forfeited to J. L. Wallace at his option without notice, not as a penalty, but as compensation for the use of said property up to such time, and as liquidated damages for the breach of this agreement and thereupon this agreement shall be of no further force and effect and becomes null and void, and it is agreed that the possession of said property shall forthwith be surrendered to J. L. Wallace. Provided that if any purchaser shall become disabled by accident or sickness there shall be no forfeiture during times he is so disabled, and in case of death a receipt in full and deed will be executed to the heirs of the applicant without further payment. In consideration of the faithful performance of the agreement, herein set forth by the buyer herein, J. L. Wallace agrees and binds himself to execute and deliver to the buyer herein, a warranty deed conveying good title to the above-described lots at any time upon receipt of payment in full for said lots.

"Witness our hands this 30th day of June, 1910.

"[Signed] D. M. SHELTON, Buyer.

"J. L. WALLACE,

"By C. V. EGGLESTON."

Notes were given for the deferred payments. After making several payments in accordance with the terms of his contract,

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Shelton decided to rescind the same, which he attempted to do by defaulting in the payments. After four of the notes had become due, Wallace brought suit thereon in the justice of the peace court, where judgment in his favor had been rendered prior to the time of bringing of this suit, which was upon the fifth unpaid and past due note, and which also was brought in the justice of the peace court, where judgment was also entered for Wallace and against Shelton. On appeal to the county court, it was stipulated by the parties that the judgment entered on the four former notes should abide the final judgment in this case. After hearing in the county court, a motion for judgment was filed by Wallace, after Shelton had rested (the burden of the case having been properly assumed by him), which motion was sustained by the court, and from which order and judgment Shelton brings error and urges a reversal on the grounds:

“First. Where an executory contract is not divisible, and one party makes default in the payment of installments when due, and announces his intention to make no further payments and to repudiate the contract, the other party cannot keep the contract in force and maintain a separate action for a failure to pay each installment when due, but must recover all his damages in one suit. Second. The repudiation of an executory contract, accompanied with a failure to pay installments when due, affords a defense to a recovery upon notes representing each installment on the theory of a failure of consideration, except in cases where the plaintiff brings an action for specific performance, in which event, only one action will lie for the enforcement of the entire contract. Third. The judgment in the case at bar cannot be sustained, because the defendant in error is entitled to a specific performance of the contract.”

The various propositions may properly be considered together.

By the contract, *supra*, the equitable title to the lots described was vested in Shelton, Wallace retaining only the mere naked legal title for the use of Shelton, and possession was given according to the terms of the agreement, while payment of installments and final conveyance was provided for by its terms at a future period. Thus the rights of the parties, fully understood and recognized by both, became fixed at the signing of the con-

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tract. Now, can Shelton, at his pleasure, repudiate his contract and refuse payment of his notes without a showing of fraud or failure of consideration? He claims that his repudiation of the contract and failure to pay the installment notes past due affords him an ample and complete defense to the notes which form the basis of this action on the ground of no consideration, and further claims that the only time when he would be denied such defense would be when Wallace brings an action for specific performance, in which event, one action only would lie for the enforcement of the entire contract. We do not agree with this contention, and cannot understand how there can be a repudiation and rescission of the contract set up and relied upon except both parties agree thereto. This they have not done. Where the contract vests in the vendor a right of forfeiture, such as this one does, if the price is not paid as agreed, such a provision is personal to him, and he may maintain an action for the price, although the purchaser has defaulted. 39 Cyc. 1902.

As was said in *North Stockton Town Lot Co. v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438:

"An action to recover installments on a written contract for the sale of land, after the vendor had waived his right to terminate the contract and declare payments made forfeited for the purchaser's failure to make payments as prescribed, is an action of debt for money due on a written contract, and not a suit in equity in which plaintiff is required to prove damages."

In *Samuel v. Allen*, 98 Cal. 407, 33 Pac. 273, in speaking of an action similar to the one at bar, the court says:

"There is, therefore, no statutory prohibition upon the right to a personal action to enforce the debt when it becomes due. The action is for money due as much as though suit were upon a promissory note."

In *Niles v. Phinney*, 90 Me. 122, 37 Atl. 880, which was a suit on three promissory notes which were given as a part consideration of certain real estate, under circumstances somewhat similar to those in this case, it appears that, after the agreement had been executed and the purchaser had taken possession, which he retained for some time and then voluntarily abandoned the premises and refused to pay the balance of the purchase price

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represented by the notes sued on, it was held that neither the defendant's neglect or refusal to pay his notes at maturity nor his voluntary abandonment of the premises could have the effect to determine or rescind the contract with the plaintiff, and that the vendor had the right to request a strict compliance with the conditions of the agreement, and to enforce a forfeiture for breach thereof, also that he had a right to waive a forfeiture of the bond and to enforce payment of the notes by suit. He chose the latter course, and the court held that he had a right to sue on the notes and to enforce payment thereon, notwithstanding the other remedies that were open to him. The court cited, in support of its holding, *Manning v. Brown*, 10 Me. 49; *Shaw v. Wisc.*, 10 Me. 113, *Little v. Thurston*, 58 Me. 86; *Cook v. Walker*, 70 Me. 235; *Newhall v. Ins. Co.*, 52 Me. 180.

In *Cartwright et al. v. Gardner*, 5 Cush. (Mass.) 274, it was said:

"Where, on a sale of land, the purchaser paid a part of the purchase money, and gave his notes for the residue, payable respectively, in one, two, three, and four years, and the vendor agreed, upon payment of the notes as they should become due, to convey the land to the purchaser; and it was further agreed that, if the purchaser should refuse or neglect, upon request, to pay either of the notes as they should respectively become due and payable, the vendor's obligation to give a deed should become void and of no effect, and all moneys previously paid on account of the purchase should be retained by the vendor, as liquidated damages, for the nonperformance of the contract on the part of the purchaser—it was held that this latter stipulation was for the benefit of the vendor, who might avail himself of it at his pleasure, but that it did not authorize the purchaser to refuse payment of his notes."

See, in support of this principle, *Clark v. O'Loughlin*, Morris (Iowa) 375 (star page 495); *Shepherd v. Merrill*, 20 N. H. 415; *Curtis Land & Loan Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

In some jurisdictions the vendor cannot, on a breach by the purchaser, maintain an action at law for the unpaid purchase price if the contract is executory (39 Cyc. 1900), but his remedy is in equity for specific performance or rescission, or at law for

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damages for breach of the contract, but this doctrine does not obtain in this state. Here, as a general rule, if a purchaser of real estate defaults in the performance of his part of the contract, as where he fails or refuses to pay the purchase money to the vendor who has performed, or who stands ready and willing to perform, the vendor has a right of action to recover the amount due and unpaid. Therefore the plea of no consideration, in the light of the foregoing authorities, cannot be sustained. The covenants of Shelton, as evidenced by his contract, notwithstanding it provides for payment by installments, were independent covenants and not dependent or concurrent, and recovery can be had thereon in this action as soon as the same, or any of them, become due. This answers in the negative, too, the assumption that the contract is entire and indivisible, and that the breach of one part thereof is a breach of the whole. The contract was mutual; the promise of one party was a good consideration for the promise of the other, and there can be no such thing as its rescission by one of the parties without the consent of the other. It is too much to say that Wallace will not convey when the conveyance is due. There is nothing in the record warranting such conclusion and, even though he should default and fail to perform, Shelton would have his remedy against such breach by way of specific performance or in damages or otherwise; and, while the contract in a sense is indivisible, yet it is also possessed of certain well-defined yet independent covenants, upon the breach of which the rights of the parties are automatically changed only to the extent that separate causes of action arise, and may be maintained by the parties thereon as the facts and circumstances of the case may require. This being true, it follows that the judgment of the lower court is right and should be affirmed, and that the status of the pending suits on the four preceding notes, as stipulated by the parties, should be determined by this conclusion.

By the Court: It is so ordered.

WHITCOMB v. OLLER *et al.*

No. 3217. Opinion Filed December 23, 1913.

(137 Pac. 709.)

1. **EVIDENCE—Best and Secondary—Entries in Books of Account.** It is competent for one who has personal knowledge of a transaction to testify thereto, although books of account covering the transaction are kept by the creditor.
2. **PRINCIPAL AND AGENT—Proof of Agency—Competency.** Agency and the extent of authority may be proved by the testimony, though not by the declarations of the agent.
3. **JUSTICES OF THE PEACE—Pleadings—Sufficiency—Appeal.** The same degree of particularity in pleadings is not required in actions before a justice of the peace that is required in courts of record, and a pleading that is sufficient in a justice's court is sufficient in the appellate court, where the cause is tried *de novo* upon appeal.
4. **PRINCIPAL AND AGENT—Acts of Agent—Liability of Principal.** One who, with knowledge of a given transaction, accepts the benefits flowing therefrom, done by one assuming, though without authority, to be his agent, ratifies the act, and is liable therefor to the same extent as if authority to act had been previously given.
5. **APPEAL AND ERROR—Harmless Error—Instructions.** Where it appears from the evidence that a verdict is so clearly right that, had it been different, the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instructions.

(Syllabus by Sharp, C.)

Error from County Court, Pittsburg County;
B. P. Hammond, Judge.

Action by Jacob Oller and F. C. Oller, doing business under the firm name and style of the Oller Heating Company, against James A. Whitcomb. Judgment for plaintiffs, and defendant brings error. Affirmed.

Fuller & Porter, for plaintiff in error.

Harry T. Kyle, for defendants in error.

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Opinion by SHARP, C. This case originated in a justice of the peace court, where the plaintiffs, Jacob Oller and F. C. Oller, doing business under the firm name and style of the Oller Heating Company, obtained judgment against the defendant, James A. Whitcomb, in the sum of \$51.55. On appeal to the county court, plaintiffs again had judgment. The facts out of which the controversy arose are that defendant, in July, 1906, and subsequent thereto, was the owner of a large residence building in McAlester, which he permitted an employee named Leoffler to occupy and use free of rent. In December, 1909, the furnace in said residence fell to pieces, and Leoffler, acting, as he claims, for Whitcomb, ordered repairs thereon to be made by the plaintiffs, and instructed them to send the bill to Whitcomb. The bill was first sent to Leoffler and afterwards to Whitcomb. The latter paid no attention to repeated notices sent him at intervals of from two to six weeks apart. The evidence of the plaintiffs consisted of the testimony of F. C. Oller as to the doing of the work, its necessity in the house, and the nonpayment therefor by defendant, and that of Leoffler, by deposition, concerning the giving of the order for the repairs, and his agency and authority in acting for defendant in causing the repairs to be made. To his deposition was attached a letter to him from defendant, the first part of which reads:

"Dear Sir: Authority is unnecessary to take care of my property in South McAlester. I gave you that when I left you there, and had expected that you would move into that house before this time."

This letter was written to Leoffler over three years prior to the transaction involved in the present case, and had reference to other repairs made to the house at that time. Leoffler, in his deposition, testified that Whitcomb was to pay for all necessary repairs, without regard to when contracted.

In the first assignment of error, it is urged that the account upon which plaintiffs' action was founded was not properly proved, and that section 5114, Rev. Laws 1910, controls in making proof of entries in books of account. F. C. Oller, a member of the plaintiff firm, testified that the charges contained in the

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bill of particulars were correct, and that he did the work. The books of account were not offered in evidence, but instead, the witness testified as to his personal knowledge of the transaction. This evidence was eminently proper and of the highest character. The statute only affords a means by which proof may be made, and does not attempt to furnish the sole manner of making such proof. *Moore v. Joyce*, 23 Miss. 584; *Godbold v. Blair*, 27 Ala. 592; *Crosland Co. v. Pearson*, 86 S. C. 313, 68 S. E. 625.

It is next urged that the agency of Leoffler was not sufficiently proved, and that, as the evidence of his agency was improper, the defendant's demurrer to the evidence should have been sustained. In support of this contention, counsel cite *Chickasha Cotton Oil Co. v. Lamb & Tynor*, 28 Okla. 275, 114 Pac. 333, wherein the court said:

"Admissions of an agent, in order to be admissible against the principal, must be made as agent, and while he is acting for the principal within his authority; it must first be shown by competent evidence that such admissions were made in and as a part of the agent's performance of his duties and within the scope of his authority."

The mere reading of this excerpt of the opinion discloses its inapplicability here, for, in the present case, it was not sought to introduce the admissions or declarations of the agent as to the fact of the agency. The agent himself was the witness testifying, and it was competent for him to give testimony whether the relation existed or not, and its extent, if it, in fact, did exist. *Aultman v. Knoll*, 71 Kan. 109, 79 Pac. 1074; 1 Clark & Skyles on the Law of Agency, sec. 66; Mechem on Agency, sec. 102, 31 Cyc. 1651.

There was no such variance between the pleadings and proof as to demand a reversal. All of the statements in the bill of particulars were sustained by the evidence of Oller and Leoffler. As acknowledged by plaintiff in error, the same degree of particularity in pleading is not required in actions before a justice of the peace that is required in courts of record, and a pleading that is sufficient in a justice's court is sufficient in an appellate court, where the cause is tried *de novo*. *Garvin v. Harrell*, 27 Okla. 373, 113 Pac. 186, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B.

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744; *Holden v. Lynn*, 30 Okla. 663, 120 Pac. 246, 38 L. R. A. (N. S.) 239; *White v. Oliver*, 32 Okla. 479, 122 Pac. 156; *Rice et al. v. Folsom*, 32 Okla. 490, 122 Pac. 236.

The question of agency, involving, as it does, the authority of Leoffler to order repairs to be made, was one to be gathered from all the facts and circumstances in evidence, and a question of fact for the jury. There being competent evidence of agency, namely, Leoffler's testimony that Whitcomb was to pay for all repairs, and the letter from Whitcomb to Leoffler, stating that Leoffler had such authority, there was evidence sufficient to support the jury's verdict.

In addition to the evidence of agency and proof of authority to the agent, the rule may properly be invoked that when a principal, after knowledge that an agent, without authority, has purchased for him certain property, retains possession, and uses the same for a considerable period of time, and obtains the benefit thereof, such acts constitute a ratification of the unauthorized acts of the agent, and renders the principal liable for the payment of the purchase money. *United States Fidelity & Guaranty Co. v. Shirk*, 20 Okla. 576, 95 Pac. 218; *Fant v. Campbell*, 8 Okla. 586, 58 Pac. 741; *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875; *Haney School Furniture Co. v. Hightower Baptist Institute*, 113 Ga. 289, 38 S. E. 761; *Henry Voght Mach. Co. v. Lingensfelder*, 23 Ky. Law Rep. 38, 62 S. W. 499; *Anderson v. Johnson*, 74 Minn. 171, 77 N. W. 26; *Hobkirk v. Green*, 26 Misc. Rep. 18, 55 N. Y. Supp. 605; *Bodine v. Berg*, 82 N. J. 662, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721; *Russell v. Waterloo Threshing Mach. Co.*, 17 N. D. 248, 116 N. W. 611; *Anderson Coal Mining Co. v. Sloan, Howell & Co.*, 46 Pa. Super. Ct. 320; *D. Sullivan & Co. v. Ramsey* (Tex. Civ. App.) 155 S. W. 580; *Union Bank & Trust Co. v. Long Pole Lbr. Co.*, 70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663; *Twentieth Century Co. v. Quilling*, 136 Wis. 481, 117 N. W. 1007; 1 Clark & Skyles on the Law of Agency, p. 325; Mechem on Agency, secs. 148, 150. As already seen, statements of this account were not only sent to Leoffler, defendant's agent, but afterwards to defendant, and at no time did the latter repudiate the act of Leoffler

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in ordering the repairs to be made, but, on the other hand, by his passive conduct availed himself of the plaintiffs' material and labor in installing the repairs, which, if the furnace was to be longer used, were a necessity.

The objections to the instructions, in view of our conclusions, are not of sufficient magnitude to work a reversal of the case. While it is doubtful if plaintiffs' right to recover is in any way affected by the provisions of sections 3813, 3814, Rev. Laws 1910, yet, there being sufficient proof of Leoffler's agency, apart from the fact of defendant's ratification, to sustain the verdict, the jury obviously reached a proper conclusion, for it is not every error that works a reversal of a judgment. Considering the case from the standpoint that defendant by his continued silence acquiesced in his agent's act, no other verdict could properly have been returned.

Where it appears from the evidence that a verdict is so clearly right that, had it been different, the court should have set it aside. such verdict will not be disturbed merely for the reason that there is error found in the court's instructions. *Shawnee Nat. Bank v. Wooten & Potts*, 24 Okla. 425, 103 Pac. 714; *Mitchell v. Altus State Bank*, 32 Okla. 628, 122 Pac. 666; *Horton v. Early*, 39 Okla. 99, 134 Pac. 436.

For the reasons stated, the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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No. 2727. Opinion Filed June 30, 1913.

Rehearing Denied December 30, 1913.

(135 Pac. 351.)

1. **APPEAL AND ERROR — Review — Questions of Fact — Fraud.** Fraud is a fact to be established as any other fact, and where a jury has passed upon the question, and there is any evidence in the record reasonably tending to support the verdict, the same will not be disturbed in this court on appeal.

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2. **TRIAL—Instructions—Burden of Proof.** Instructions examined, and held to correctly state the law applicable to the facts of this case.
3. **SAME—Refusal of Request.** Where instructions given fairly contain the substance of an instruction refused, the refusal to give such instruction is not reversible error.
(Syllabus by Robertson, C.)

Error from District Court, Carter County;
S. H. Russell, Judge.

Action by L. L. Tyer & Son against M. Wheeler. Judgment for defendant, and plaintiffs bring error. Affirmed.

H. H. Brown, T. L. Wright, and L. G. Shelton, for plaintiffs in error.

H. C. Potterf and E. A. Walker, for defendant in error.

Opinion by ROBERTSON, C. Plaintiffs below sought to recover \$2,000 from defendant as commission for the sale of certain real estate in the city of Ardmore. In their petition they allege that on July 3, 1907, they were in the real estate business, and on said date made and entered into a contract with defendant, whereby they were to have the exclusive sale agency of lot 17, in block 326, in said city of Ardmore; that said contract was to cover a period of three years; that during said time they procured a purchaser for a portion of said property in the persons of Jones Bros., who bought the same and paid \$23,000 therefor; that during the life of the contract the remainder of the property was sold for \$17,000, making a total of \$40,000 received by defendant for said property; that by the terms of said contract they were entitled to \$2,000 as commission, for which they prayed judgment. Defendant filed both a special and a general demurrer to the petition, both of which were overruled, whereupon he answered by general denial, and particularly denied that the contract made July 3, 1907, gave to plaintiffs, or either of them, the exclusive right to sell said property, and denied that plaintiffs were the procuring cause of the sale of said property, or that they had anything to do with the said sale; the defendant, further answering, charged that plaintiffs were guilty of fraud in the procure-

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ment of the contract upon which they expect to recover, and allege that originally defendant made a contract with Tyer & Drennan, whereby he rented them a part of the building on said lot and agreed to pay them \$500 as commission, provided that they would sell said property for \$40,000 cash, in which contract it was specially agreed that said firm did not have the exclusive right to sell said property, but that said defendant at all times reserved the right to sell or otherwise dispose of the same himself; that thereafter the firm of Tyer & Son succeeded to the business of the said Tyer & Drennan, who, as such successor, came to defendant and requested him to carry out with them the terms and conditions of the original contract, and defendant agreed to do so. Defendant charges that, his eyesight being very poor, he could scarcely see to sign his name, and that, depending on the statement of said plaintiffs that they had prepared an exact copy of the original contract, except the change in the names, he signed the same, whereas in truth and in fact the last contract was very different from the original contract, and he, for the reasons aforesaid, signed the same thinking it contained the same terms as the original. No reply was filed to this answer. The cause was tried to a jury, and resulted in a verdict for the defendant and plaintiffs bring this appeal and urge a reversal for that: First, the court erred in giving instruction No. 4 to the jury; second, the court erred in giving instruction No. 7 to the jury; third, the court erred in refusing instruction No. 1, requested by plaintiffs; fourth, the court erred in refusing instruction No. 2, requested by plaintiffs; fifth, the court erred in overruling the motion of plaintiffs for a new trial.

We will consider these alleged errors in their order. Instruction No. 4, given by the court, and to the giving of which plaintiffs object, reads as follows:

“You are instructed that before one employed to negotiate a sale can recover a commission for his services, he must show that he produced the purchaser, and that he was the producing cause of the sale; that is, that the means employed by him and his efforts resulted in the sale, or were such as to find the purchaser with whom the sale was accomplished.”

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Counsel for plaintiffs insist that there is error in this instruction, for that by its provisions the jury would necessarily have to find that plaintiffs procured the purchaser before they could claim the commission, and that they, having the exclusive agency for the sale of the property, would by said instruction be denied the benefit of their said contract. The defendant in error insists that the above instruction is a correct exposition of the law on the subject, and calls attention to the fact that plaintiffs in objecting to this instruction lose sight of the fact that defendant in his answer specifically charges fraud in the procurement of the contract, and that he yet insists that he at no time ever gave plaintiffs the exclusive agency for the sale of said property, but, on the contrary, retained the right to sell or otherwise dispose of it himself. An examination of the pleadings also shows that the sufficiency of the charge of fraud as set up in defendant's answer was not challenged by motion or demurrer, or objection to the introduction of evidence thereunder. This charge of fraud raised squarely an issue of fact (on the exclusive contract of sale question), to be determined by the jury under proper instructions from the court, and the rule in such case is that, where there is any evidence reasonably tending to support the verdict of the jury, this court will not disturb its finding on appeal. This, we think, effectually disposes of this phase of the case, and establishes as a positive fact the contention of defendant, on issues fairly raised and submitted, that there was no exclusive sale agency contract existing between the parties. Fraud is a fact to be determined by the jury as other questions of fact, and the allegations of fraud in the defendant's answer, unchallenged by motion, demurrer, or other objection, sufficiently raised the issue, which was determined adversely to the plaintiffs' contention, and of that determination they have no right to complain; consequently there was no error in the giving of this instruction. This conclusion also renders it wholly unnecessary to decide whether the contract was or was not one giving the exclusive right of sale of the property to plaintiffs.

It is next urged that the court erred in giving to the jury instruction No. 7 of the general charge. It will be unnecessary

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to set out the entire instruction. Counsel insist that the following language therein, to wit:

“But should you believe from a preponderance of the testimony that there was a contract which expressed the purpose and intention of the plaintiff and defendant,” etc.

—imposed upon plaintiffs the burden of proving the contract valid, whereas the contract, as pleaded, was presumed to be valid until fraud was shown by the parties denying its validity. By the petition it was alleged that plaintiffs and defendant made a certain contract; the answer denied that such a contract was, in fact, ever made; to enable plaintiffs to recover they were obliged to prove the contract; thus an issue of fact was joined, and the court very properly instructed the jury that in case they found that such a contract was made, and that it expressed the purpose and intention of the parties, and which, among other things, gave plaintiffs the exclusive agency of sale of the property, then and in that case they would be entitled to recover the \$2,000 as claimed, but if they found from the evidence that a different state of facts existed, and that the parties prior to the execution of the last contract had agreed among themselves that, if the owner did sell the property while the first contract was in existence, he would be bound to pay them only \$500 as a commission, this was all within the issues formed by the pleadings and constituted but simple questions of fact, which the jury were required to answer. The giving of this instruction did not shift the burden in proving or establishing the issues. The plaintiffs were required, under the law, to establish the allegations of their petition by proof to the satisfaction of the jury. These allegations were denied by the answer of the defendant. The court by instruction No. 7 defined these issues. The only objection we can see to this instruction is that it embraces several propositions, and perhaps should have been divided and separately numbered, but no objection in this regard was made by either of the parties, nor can we say that such defect was more detrimental to plaintiffs than to defendant.

The balance of this instruction, to wit:

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"You are instructed that if the terms of the contract sued on are ambiguous or uncertain with reference as to whether it was intended to prevent the defendant from exercising the right to sell the property in controversy, then such ambiguous language must be interpreted in the sense in which Wheeler believed at the time he signed the contract that the plaintiff Tyler understood it"

—is certainly unobjectionable to plaintiffs. The instruction, as a whole, under the pleadings and the facts, correctly stated the law applicable, and the objection made against it is without merit.

It is insisted that the court erred in refusing to give instructions Nos. 1 and 2, requested by plaintiffs. We have carefully considered these instructions, and feel that, while they doubtless correctly state the law, yet counsel have no right to complain of the court's action, inasmuch as the substance and essence of these instructions were given the jury by the court in the general charge. *Eisminger v. Beman*, 32 Okla. 818, 124 Pac. 289. Where the instructions, as given, fairly contain the substance of an instruction refused, the refusal of such instruction is not reversible error. *Standifer v. Sullivan*, 30 Okla. 365, 120 Pac. 624; *Nat. Drill & Mfg. Co. v. Davis*, 29 Okla. 625, 120 Pac. 976; *Scott v. Vulcan Iron Wks. Co.*, 31 Okla. 334, 122 Pac. 186; *St. L. & S. F. R. Co. v. Walker*, 31 Okla. 494, 122 Pac. 492. The issues in this case were simple. The court succinctly covered them with instructions fair to both parties, the result of the action was determined by the issues of fact submitted to the jury, and with the finding of the jury on these issues we find no fault.

The judgment should be affirmed.

By the Court: It is so ordered.

JORDON v. ST. LOUIS & S. F. R. CO.

No. 2919. Opinion Filed October 14, 1913.

Rehearing Denied December 30, 1913.

W. L. Johnson, for plaintiff in error.*R. A. Kleinschmidt, J. H. Grant, and M. D. Owen*, for defendant in error.

Opinion by BREWER, C. This appeal is prosecuted by case-made. A motion for new trial was filed on December 12, 1910. The record fails to show when this motion was acted upon. The case-made was served on opposing counsel April 19, 1911. The record is not certified as a transcript.

The record before us failing to affirmatively show that the case-made was served within three days after final judgment, or within an extension of time properly allowed by the court, the same is a nullity and presents nothing for this court to review. The cause is dismissed. *Com'rs v. Porter*, 19 Okla. 173, 92 Pac. 152; *Bettis v. Cargile*, 23 Okla. 301, 100 Pac. 436; *Lankford v. Wallace*, 26 Okla. 857, 110 Pac. 672; *Carr v. Thompson*, 27 Okla. 7, 110 Pac. 667; *Lathin v. Schlack*, 27 Okla. 522, 112 Pac. 968; *Willson v. Willson*, 27 Okla. 419, 112 Pac. 970; *McCoy v. McCoy*, 27 Okla. 371, 112 Pac. 1040; *School District v. Cox*, 27 Okla. 459, 112 Pac. 1041; *First Nat. Bank v. Oklahoma Nat. Bank*, 29 Okla. 411, 118 Pac. 574; *Bettis v. Cargile*, 34 Okla. 319, 126 Pac. 222.

By the Court: It is so ordered.

THE
SUPREME COURT

STATE OF OKLAHOMA

JANUARY TERM, 1914

PRESENT:

SAMUEL W. HAYES, CHIEF JUSTICE.
MATTHEW J. KANE, VICE CHIEF JUSTICE.
R. L. WILLIAMS,
JOHN B. TURNER, } JUSTICES.
R. H. LOOFBOURROW, }

COMMERCIAL UNION ASSUR. CO., LIMITED, OF LON-
DON, ENG., v. WOLFE.

No. 3226. Opinion Filed January 13, 1914.

(137 Pac. 704.)

1. **APPEAL AND ERROR—Review—Findings of Fact.** The questions at issue in the action, being (1) whether or not a proper demand had been made for the production of the books and inventory provided for by the iron-safe and inventory clause in the standard form of fire insurance policy, and (2) whether or not the insured's failure to produce his books and inventory was due to his fault or negligence, are questions of fact to be submitted to the jury, under proper instructions, as to the law governing, and the finding of the jury thereon, being supported by sufficient evidence, will not be disturbed.
2. **EVIDENCE—Best and Secondary.** The best evidence the nature of the case will permit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed.

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3. **SAME.** Where the last inventory and books of the assured have been lost or stolen through no fault of his, it is not error to admit oral proof to establish the value of the property destroyed by the fire.

(Syllabus by Galbraith, C.)

*Error from Superior Court, Pottawatomie County;
Geo. C. Abernathy, Judge.*

Action by C. Dale Wolfe, trustee of the estate of D. A. Trotter & Co., against the Commercial Union Assurance Company, Limited, of London, England. Judgment for plaintiff, and defendant brings error. Affirmed.

Burwell, Crockett & Johnson and Scothorn, Caldwell & McRill, for plaintiff in error.

Lydick & Eggerman, for defendant in error.

Opinion by GALBRAITH, C. D. A. Trotter & Co., a partnership, were the insured. After the loss upon the policy in suit, the insured were adjudged bankrupts, and the plaintiff, C. Dale Wolfe, was elected and qualified as trustee, and, as such, prosecuted the action on the policy, and recovered a judgment, from which the defendant appealed.

The first and second assignments of error are argued together, and these are that the verdict of the jury is contrary to the law and the evidence. It is contended that the insured breached the "iron-safe clause" of the policy, wherein he agreed to keep his books and "last inventory" securely locked in an iron safe at night, and when the store building was not open for business, and also failed to produce the inventory and these books for the inspection of the company after the fire, and for that reason the policy was void and no recovery could be had thereon. The iron-safe and inventory clause in this policy was the same as those in the ordinary standard form, and are recognized as reasonable and binding provisions of an insurance contract. *German American Ins. Co. v. Fuller*, 26 Okla. 722, 110 Pac. 763.

The plaintiff, in his petition, specially pleaded a waiver by the defendant of these clauses in the policy, setting out that on the 27th day of September, 1909, which was nine days after the fire,

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one E. W. Roberts, the agent of the company, duly authorized, visited the scene of the fire and investigated the same, and informed the insured that the company denied liability, and would not pay him anything on the policy, and that thereby the company waived the furnishing of proof of loss and the production of the books and inventory, as provided in the policy. The petition was duly verified, and the defendant's answer denying the same was not made under oath. However, the evidence introduced at the trial showed that the insured made a complete inventory of his stock of merchandise on or about the day the policy in suit was written, May 26, 1909, and kept a complete set of books from that day forward until the fire. That these consisted of a day-book, in which was entered the daily sales, both for cash and credit, and a ledger in which was entered bills receivable, and another ledger in which was entered the bills payable and the merchandise accounts. That he had no iron safe in his store building, which was located in a small country village, away from the railroad, in Seminole county, but that he kept the inventory and books at night, when the store was not open for business, at his residence, which was separate and apart from the store building, and that the inventory and these books were intact and ready to be produced for the inspection of the company after the fire, and that no demand was made upon him to produce them on the first visit of the agent of the company, nine days after the fire. That some 30 days later he moved his residence from the place where the store burned to another location in Seminole county, and, in the confusion resulting from the change of location, the ledger containing the bills payable and merchandise accounts, and the blotter containing the cash sales, were either lost or stolen, and that he had made diligent search for them a number of times since moving and was unable to find them, although he had one ledger and a copy of the cash sales account, and produced them for the inspection of the agent of the company on his visit to the scene of the fire more than 60 days after the loss.

The record shows that the jury were properly instructed as to the law governing these questions, and were told that the

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provisions of the policy providing for keeping a complete set of books and for taking an inventory of the stock insured, and for keeping these books in an iron safe were valid and binding provisions, and that they imposed upon the insured the duty of showing a substantial compliance therewith, or a waiver on the part of the company, and that the law and these provisions did not require the insured to produce his books and inventory unless they were demanded by the company, and, further, that he was not required to produce them upon demand unless they were in existence, or unless they had been destroyed by his carelessness or negligence, so that the question whether or not a proper demand had been made for the production of the books and inventory by the agent of the company, the question of waiver by the agent, Roberts, and whether or not the insured's failure to produce all of his books was due to his fault or negligence, and whether or not he had substantially complied with these provisions were questions that were properly and fairly submitted to the jury by the trial court, and the finding of the jury thereon being supported by the evidence, as it clearly is, the finding should not be disturbed, and these exceptions should be overruled.

The remaining assignments complain of the rulings of the court in admitting oral testimony over the objection of the insurance company to prove the value of the stock of merchandise destroyed by the fire. Plaintiff was permitted to prove by the insured that the value of the stock of goods at the time the policy was written was \$2,650; that the amount of goods purchased between that time and the date of the fire was \$600; that the amount of his cash sales between the date of the policy and the loss was about \$600. This witness was corroborated as to the value of the stock at the time of the fire by another witness, who was formerly in partnership with the insured, and owning a half interest in the business, and who sold out some four months before the policy was written, but was familiar with the stock and its value from that time up to the fire. This, it seems, was the best evidence available for showing the amount of the loss in the absence of the books, which, it had been shown, could not be produced, because they had been lost or stolen, and through

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no fault or negligence of the insured. This character of testimony was competent. Its weight was for the jury. Secondary evidence is admissible in the absence of primary evidence, especially where the absence of primary evidence is satisfactorily accounted for.

"And the one general rule that runs through all the doctrine of trial is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed." (3 Blackstone, p. 368.)

"Where there are no books or inventories, or they have been destroyed, secondary evidence is admissible to show the value of the destroyed property." (Cooley's Briefs, Law of Ins., p. 3123.)

"Merchants engaged in different lines of business, who saw a stock of insured goods before it was destroyed by fire, may testify as to the value of such stock, although their testimony is not as satisfactory as might be desired." (*Graves v. Merchants & Bankers' Mfg. Co.*, 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507.)

The effect of this testimony was to show that the loss sustained exceeded \$2,000, the amount of the policy being \$1,500, and it was sufficient to sustain the verdict of the jury for the full amount of the policy.

The record shows that the trial court gave every instruction to the jury which the insurance company requested, and that every possible phase of their contention in this suit was fairly presented to the jury in instructions prepared by them, and, there being ample evidence in the record to sustain the verdict of the jury, we see no reason why the judgment appealed from should not be affirmed.

By the Court: It is so ordered.

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SHAW v. LORD.

No. 3250. Opinion Filed January 13, 1914.

(137 Pac. 885.)

1. **ASSAULT AND BATTERY—Self-Defense—Injury to Bystander—Liability.** It is error to instruct the jury in effect that one who, in his lawful self-defense, at close range shoots at an assailant, and, missing him, accidentally wounds a bystander, who, at the time, is to one side of the line of true aim at such assailant, and a few feet away from him, is, in an action for damages, liable to such bystander if he knew or is chargeable with knowledge of the presence of such bystander, as if this, of itself, constituted want of due care, and therefore was, *per se*, actionable negligence.
2. **SAME—Question for Jury.** Ordinarily, where a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence; and the question of negligence is for the jury.

(Syllabus by Thacker, C.)

*Error from District Court, Le Flore County;
Malcolm E. Rosser, Judge.*

Action by Anna Lord against John Shaw. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Andrews & Day, for plaintiff in error.

J. E. Whitehead and *C. R. Barry*, for defendant in error.

Opinion by THACKER, C. Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On July 1, 1905, defendant, a deputy United States marshal, and Bert True, a posseman, having a warrant duly authorizing them to do so, undertook the arrest of Joseph Smith, who was a fugitive from justice, charged with a felony, and who was believed by defendant to be so dangerous that he might kill an officer trying to arrest him, unless he realized the latter had a clear advantage of him, and that resistance would be futile.

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True resided in Wilburton, Okla. (then Indian Territory). Defendant, in response to a phone call from True, who then had possession of the warrant, came to Wilburton about five o'clock in the afternoon, had Smith pointed out to him on a street by some one, and thereafter, between five and six o'clock in the afternoon, with True, for the purpose of arresting Smith, went to a hotel in Wilburton, where Smith was eating supper, and where he had spent the preceding night. Upon arrival at the hotel, defendant requested and caused a lady, who was in the hall leading from the front door, on the north, to the door of the dining room, on the south, to request Dave Nowland, a boarder at the hotel, who was an ex-officer, and well known to defendant, to come from the dining room to the front porch, on the north of the hotel, where, according to the undisputed testimony of defendant, of True, and of Nowland, defendant ascertained from Nowland that Smith was then eating supper in the dining room, informed Nowland of the purpose of himself and True to arrest Smith, and requested Nowland to follow Smith from the dining room into said hall, and there seize him from behind so as to prevent him from drawing any weapon, while they effected the arrest; and, although Nowland testified he did not intend to "arrest" Smith, nor to exactly comply with defendant's request, when he left the table with Smith, he further testified, in effect, that he started to follow Smith out to see what might occur, and render such assistance as he could; and it appears to be uncontradicted that Nowland assented to defendant's plan for the arrest, and that defendant, with good reason, believed that Nowland would follow and seize Smith so that his arrest might be safely effected. When Smith left the supper table, it appears that Nowland also left it, and went as far as the door of exit from the dining room into the hall, but met and turned back with a fellow boarder to seats at the table, perhaps abandoning his purpose to assist defendant.

It appears that Smith knew defendant, but it does not appear whether the defendant knew or suspected this, nor whether in fact Smith knew he was an officer; and it appears that True, if not the defendant, saw Smith step from the dining room into

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the hall, then step back into the dining room, and then, at once, come forth into the hall, when the shooting occurred, but it does not appear whether Smith saw or knew True before his final exit from the dining room.

Smith and one Thurston, the latter in front, entered the hall about the same time immediately preceding the shooting, and defendant, who was in waiting with True on the front porch, hearing them, if no one else approaching, either immediately before or immediately after Smith made his final exit from the dining room, advanced to the front door and looked into the hall from the porch, and, evidently to his surprise, discovered that Smith, after making his final exit from the dining room, was approaching without any one holding or in position to seize him, whereupon, when Smith had gotten half or two-thirds the way along the hall, a shooting combat at close range occurred between defendant and True, on one side, and Smith, on the other.

The evidence is very conflicting, and the facts not fully developed as to some of the features of the combat; but it seems reasonably certain that Smith, in a crouching position, and with his hand on his pistol in his hip pocket, was approaching defendant before defendant fired at him, and perhaps before defendant drew or commenced to draw his pistol (one of plaintiff's witnesses, Mr. Thurston, in a measure, corroborates defendant on this point, and it is undisputed). It also seems certain that both defendant and True, the former first, fired at Smith from their position in the front door, at the north end of the hall, and that Smith, after defendant fired, fired and struck the door stop so close to True's head as to cause splinters therefrom to strike his cheek. It also appears reasonably certain, notwithstanding the testimony of one witness to more, that only one shot was fired by defendant and one by True before Smith, who also probably fired only one shot, got out to the steps in front of the hotel.

Plaintiff, then a girl of fifteen years engaged in work at the hotel, without notice of the impending danger, stepped into the hall, from a washroom, within a few feet of Smith, but, it appears, to the east of him, and there received a wound in her

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right side when the shooting commenced; and, although both defendant and True testified in effect that the shot fired by the latter was the one that struck her, and plaintiff so stated soon after she was shot, we must assume, in deference to the verdict and her testimony to that effect, that defendant's shot, which was the first one fired, was the one that struck her. It appears that the ball entered in front, at about the eighth rib, and made its exit about six inches back, without penetrating the cavity of her body; and, besides being confined to her bed for about two weeks, with the suffering incident to such case, she has since suffered occasional soreness at the places of entrance and exit of ball and, during cold weather, pain in her shoulder, "just like [she] did when [she] was shot." It is alleged in plaintiff's petition that defendant entered the hotel "excitedly, and drew a pistol from his pocket, and began firing the same rapidly and excitedly, and in a very careless manner; that one bullet from the pistol penetrated the body of plaintiff * * * that said shooting by said defendant was wholly without cause; * * * that, by reason of said wrongful and negligent act of the said defendant in shooting this plaintiff, as aforesaid, she has been damaged," etc.

The defendant's answer, besides a general denial, especially denies that he fired the shot which wounded plaintiff, and shows that he was authorized to arrest Smith, that the shot he fired was in necessary self-defense while lawfully and properly endeavoring to arrest Smith, so that, if, by chance, the shot fired by him struck plaintiff, he is not liable for damages for such accident.

The trial court instructed the jury that defendant had the right to fire at Smith when he did; but further instructed in effect that defendant would be liable to plaintiff for damages if he was guilty of negligence in shooting at Smith without due regard for the safety of bystanders, and, still further, as if this, of itself, constituted want of due care, and therefore was, *per se*, actionable negligence, that "if, at the beginning of the difficulty, Shaw saw this woman, or should have seen her, and began firing,

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knowing she was there, and a ball from his pistol struck her, then he would be responsible."

In Croker on Sheriffs (2d Ed.) sec. 62, it is said: "The arrest may be made in any place, for no place affords protection to a criminal, not even the church or the churchyard." To the same effect. see Murfree on Sheriffs, secs. 161, 162; New England Sheriffs and Constables (Hitchcock) sec. 167; 2 Am. & Eng. Enc. Law (2d Ed.) 855.

There can be no doubt of defendant's right, and under the evidence we must assume it was his duty, to effect the arrest of Smith at the hotel; but, of course, this does not relieve him of the duty to exercise such care to avoid injury to other persons as a person of ordinary prudence would usually exercise in doing so under like circumstances, or, which, in the present case, is its equivalent differently stated in respect to criteria, such care as persons of ordinary prudence usually exercise about their own affairs of great importance, and, in this aspect, great care.

In *Morris v. Platt*, 32 Conn. 75, it is held:

"Where a person in lawful self-defense fires a pistol at an assailant, and, missing him, wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence."

To the same effect, see *Parton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615. These, which are the only cases we find deciding this precise point, appear to be in accord with the general rule that, "where an act is lawful in itself, injury resulting therefrom is not actionable, unless the act is done at a time, or in a manner, or under circumstances indicative of a want of proper regard for the rights of others." *Boynnton v. Rees*, 26 Mass. (9 Pick.) 528; *Howland v. Vincent*, 51 Mass. (10 Metc.) 371, 43 Am. Dec. 442; *Tourtellot v. Rosebrook*, 52 Mass. (11 Metc.) 460; *Brown v. Kendall*, 60 Mass. (6 Cush.) 292; *Rockwood v. Wilson*, 65 Mass. (12 Cush.) 221; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Norfolk & W. Ry. Co. v. Gee*, 104 Va. 806, 52 S. E. 572, 3 L. R. A. (N. S.) 111; *Pickens v. Coal River Boom & Timber Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819. And the two cases, *Morris v. Platt* and *Paxton v. Boyer*, *supra*, also appear to be but concrete applications of the rule that

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there is no liability for the results of an accident, unless the person causing same is guilty of negligence. See 1 Am. & Eng. Enc. Law (2d Ed.) 273. The rule as announced in the cases of *Morris v. Platt* and *Paxton v. Boyer*, *supra*, is stated in Hale on Damages (2d Ed.) sec. 5, p. 19, citing, besides said two cases, *Scott v. Shepherd*, 2 W. Bl. 892, which is reported in 96 Eng. Rep. (Full Reprint) 525, and is instructive.

Ordinarily, and so far as appears in this case, this must be the correct rule; and the only qualification thereof that in any case would seem to commend itself is that, where such self-defense is obviously dangerous to others, and the necessity thereof may be avoided by withdrawing from the combat, or, in other words, by "retreating to the wall," we apprehend it would be for the jury to say whether due care for the safety of bystanders would not require such avoidance.

The instruction that "if, at the beginning of the difficulty, defendant saw plaintiff, or should have seen her, and began firing, knowing she was there, and a ball from his pistol struck her, then he would be responsible," appears to be error.

If, as affecting only Smith's rights in this regard, defendant had the right to shoot at Smith when he did, the mere fact that he may or should have seen or known that plaintiff was near Smith, but to one side of the line of a true aim, would not necessarily render him liable for the accident; certainly not, if in gun used, in aim taken, and in manner and means of firing he exercised that degree of care which a person of ordinary prudence would usually exercise.

Although defendant may be chargeable with knowledge as to where plaintiff was when he began to fire, the question as to whether he was negligent was for the jury; and, for aught that appears, she may have been so far to one side of a line of true aim as to have reasonably presented to him the appearance of safety, if he saw her—he being close to Smith when he fired.

In anticipation of a new trial in this case, we should, perhaps, state that, if there should be evidence tending to show that, without greater risk of the escape of Smith, the arrest might within the knowledge of or chargeable to defendant have been

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effected elsewhere, or in a different manner, or by different means than it was, with less danger of resistance by Smith, or less danger of injury to bystanders as a result of such resistance, the defendant being informed and believing that Smith was dangerous to the extent hereinbefore stated, it would not be improper to submit to the jury the question as to whether defendant was in that respect guilty of actionable negligence in failing to exercise due care for the safety of bystanders, which was a proximate cause of the injury inflicted upon the plaintiff, as well as to whether he was guilty of such negligence in the manner or means of his lawful self-defense, if the same was lawful. And, in this connection, it may be observed that, although Smith, in an assault upon defendant, may have been guilty of a wrong making self-defense necessary to defendant, and thus proximately causing the injury to plaintiff, and therefore liable to her in an action for damages, this would not necessarily relieve defendant of liability if he were guilty of a wrong in failing to exercise due care for the safety of bystanders, which was also a proximate cause of the same.

For the reasons stated, this case should be reversed, and a new trial granted.

By the Court: It is so ordered.

BAKER v. TATE, *Executor*.

No. 2889. Opinion Filed January 19, 1914.

(138 Pac. 171.)

1. **APPEAL AND ERROR—Presentation Below—Sufficiency.** In a motion for new trial the assignment, "error of law occurring at the trial and excepted to by the party making the application," eighth subdivision, section 5033, Rev. Laws 1910, will embrace every ruling of the trial court during the trial of the cause properly excepted to at the time such ruling was made; but, unless the errors complained of were duly excepted to at the time and presented to the trial court in a motion for new trial, either in substantially the same language as the statute, or by specifically pointing out the errors complained of, they cannot be presented to this court for review by being assigned in a petition in error.

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2. **ATTORNEY AND CLIENT—Peremptory Instruction—Pleading and Evidence.** Plaintiff as executor sued defendant for the sum of \$750, alleged to have been collected by defendant as attorney for the estate of which plaintiff was executor. Defendant answered, pleading that he had collected only \$620, \$220 of which was due him for fees and money disbursed, and that he had the balance, \$400, in his possession. He testified to having collected \$620, \$220 of which he had spent as his own fee, and that he still had \$400 belonging to the heirs of the estate. **Held**, under the admissions in defendant's answer, and under defendant's own testimony, it was not error to instruct the jury for a verdict in favor of the executor in a sum not less than \$400.
3. **SAME—Action for Money Collected—Instruction—Attorney's Fees.** On the question of the amount of fees due defendant for his services, the court instructed the jury as follows: "In ascertaining the reasonable value of the attorney's fees of defendant, in the litigation wherein said fees are claimed, you will consider the nature of the litigation, the amount involved, and the interest at stake, the capacity and fitness of defendant to render said services, the services and labor rendered by defendant, the length of time required to perform same, the benefit received by plaintiff from said litigation in the way of recovery, and you will look to all the evidence in the case and exercise your sound discretion and judgment thereon, and allow defendant such reasonable amount as you believe he is justly entitled to, not exceeding the sum of \$200, the amount claimed by him." **Held**, this instruction was not prejudicial to the rights of defendant.

(Syllabus by Harrison, C.)

Error from County Court, Seminole County;
T. S. Cobb, Judge.

Action by H. M. Tate, executor of the estate of Dinah Johnson, deceased, against J. A. Baker. Judgment for plaintiff, and defendant brings error. Affirmed.

C. Guy Cutlip, for plaintiff in error.

Crumph, Fowler & Skinner, for defendant in error.

Opinion by HARRISON, C. This was an action by H. M. Tate, as executor of the estate of Dinah Johnson, deceased, against J. A. Baker as attorney for the heirs of deceased, to recover the sum of \$750 alleged to have been collected for said heirs by J. A. Baker as their attorney and not paid over to said executor. The issues involved are briefly stated in the pleadings, the petition being as follows:

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"Plaintiff states that he is the duly qualified and acting executor of the estate of Dinah Johnson, deceased, and as such brings this action against said defendant, and for cause of action plaintiff states: That on or about the 5th day of March, 1911, the said above-named defendant as attorney for said plaintiff in the case of said plaintiff against T. C. Phillips, collected and received from V. V. Harris the sum of \$750, money belonging to said estate and to this plaintiff as executor of said estate, and which said moneys said defendant was bound and required, to pay over to this plaintiff within ten days, from the receipt thereof; that plaintiff has demanded payment of said sum of money from said defendant, but said defendant has failed and refused to pay the same, or any part thereof. Wherefore, plaintiff prays judgment. * * *"

The answer is as follows:

"Now comes the defendant, and for plea and answer to plaintiff's petition and the allegations therein contained this defendant denies each and every allegation therein contained. This defendant says that he did collect of and from one V. V. Harris the sum of \$620, of which said sum there was due this defendant for fees and disbursements the sum of \$220, but that this sum was not collected for the said H. M. Tate as executor or in any other capacity whatever, and that the money did not belong to the estate of the said Dinah Johnson, deceased, all of which was well known to the said plaintiff when he filed his petition. This defendant says that the allegation in plaintiff's petition 'that this defendant collected said money as the attorney of said H. M. Tate' is wholly and entirely untrue, and was known to the said plaintiff to be untrue when he made it. Wherefore, judgment is asked. * * *"

The cause was tried, resulting in a verdict and judgment for plaintiff in the sum of \$500, and from such judgment and the order overruling motion for a new trial, defendant appeals upon eight assignments of error, seven of which are presented and argued in the brief.

However, the material errors occurring at the trial consisted principally in the rejection of testimony offered by defendant; and, while defendant has presented such errors in his petition in error, yet, as they were not presented to the trial court in the motion for a new trial, they cannot be considered here. In *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944, this court, speaking through

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Burford, C. J., in a case presenting the identical question presented by the case at bar, held:

"The plaintiffs bring the cause here for review, and in their brief strenuously contend that the trial court erred in admitting in evidence the deeds from the deceased to the defendants, for the reason that they did not bear revenue stamps, and also in giving one of the instructions to the jury. Neither of these alleged errors are properly before this court. The statute (section 4493, Wilson's Rev. & Ann. St. [Rev. Laws 1910, sec. 5033]) prescribed eight several specific grounds for which a new trial may be granted. The eighth cause is: 'Error of law occurring at the trial, and excepted to by the party making the application.' This ground for new trial embraces every ruling of the trial court, from the time the impaneling of the jury begins until the verdict of the jury is received and recorded, and where a motion for new trial is properly made, embracing such cause, and is overruled by the trial court, an assignment of error in this court, to the effect that 'the trial court erred in overruling the motion for new trial,' will bring up for review every ruling of the trial court properly excepted to at the time, including instructions given or refused when proper exceptions were saved."

After setting out in full the motion for new trial the court continues:

"This motion contains but one statutory ground, and that presents the question of the sufficiency of the evidence to support the verdict. The allegations that the court erred in its instructions to the jury should have been presented under the eighth ground for new trial, viz.: 'Error of law occurring at the trial and excepted to by the party making the application.' And while an assignment in the motion for new trial is sufficient if stated in the statutory language, yet it was held in *Marbourg v. Smith*, 11 Kan. 554, that if, instead of following the language of the statute the moving party specifically and minutely points out the errors of which he complains, it will be sufficient. And this court, in *Boyd v. Bryan et al.* [11 Okla. 56, 65 Pac. 940] *supra*, followed the same practice. * * * The plaintiffs in error have, in their petition in error in this court, made specific assignments, complaining of the rulings of the trial court during the progress of the trial, both as to the giving of the instructions and the exclusion and admission of evidence. Such assignments in this court are not available in the absence of a motion for new trial properly embracing the errors complained of and passed on by the trial court. If the matters complained of have been prop-

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erly embraced in the motion for new trial and the same presented to the trial court, and there overruled, then an assignment of error in this court, to the effect that the trial court erred in overruling the motion for new trial, presents to this court for review every matter properly included in the motion for new trial. But this court will not reverse a case for errors of the trial court not presented to and passed upon by such court. Any cause for which a new trial may be granted is deemed waived by failure of the objecting party to move for a new trial upon such ground. *Nesbit v. Hines*, 17 Kan. 316; *Atchison v. Byrnes*, 22 Kan. 65; *Lucas v. Sturr*, 21 Kan. 480. A motion for new trial is essential in order to give the trial court an opportunity to review its rulings, and if need be to correct errors which it may have committed, and a failure to present alleged errors to the trial court by a motion for new trial will be deemed a waiver, and the Supreme Court will not review such alleged errors unless presented by a motion for new trial. *De Berry v. Smith*, 2 Okla. 1 [35 Pac. 578]; *Wood v. Farnham*, 1 Okla. 375 [33 Pac. 867]; *Laughan L. Co. v. Mo. M. & L. Co.*, 3 Okla. 174 [41 Pac. 81]; *Carter v. Mo. M. & L. Co.*, 6 Okla. 11 [41 Pac. 356]; *Beberstein v. Terr.*, 8 Okla. 467 [58 Pac. 641]; *Boyd v. Bryan*, 11 Okla. 56 [65 Pac. 940]; *Decker v. House*, 30 Kan. 614 [1 Pac. 584]; *Atchison v. State ex rel.*, 34 Kan. 379 [8 Pac. 367]; *Hardwick v. Atkinson*, 8 Okla. 608 [58 Pac. 747]."

We quote at length from the opinion, *supra*, because it passes upon all the questions involved in the case at bar, and fully discusses all the reasons for so holding, and because the rule therein announced has become the settled rule of this court. See *Garnier v. Scott*, 28 Okla. 646, 115 Pac. 789.

The fifth assignment in the petition in error is as follows:

"V. The said court and T. S. Cobb, the presiding judge, erred in the rulings upon the admission of the evidence and the remarks of the presiding judge of the evidence and the probative force and effect of the evidence made during the trial of said case, and in the presence and hearing of the jury as shown by the record of the case. * * *

"VI. The said court erred in examining witnesses on the part of the defendant in error as shown by Exhibit A. * * *

These errors were not presented to the trial court in the motion for new trial, and under the rule announced in *Glaser v. Glaser*, *supra*, they will not be reviewed here.

Baker v. Tate, Executor.

It is true that plaintiff in error presented certain specific errors in his motion for new trial, which, from the record, were duly excepted to at the time, and which, under the rule in the Glaser case, *supra*, may be reviewed here, such specific errors being that the court erred in forcing defendant to trial during the term at which the trial was had, and in overruling defendant's motion for continuance, and in giving certain instructions, and in refusing certain instructions, each of which was specifically set out in the amended motion for new trial.

As to the instructions complained of, we find no material error, for, upon the testimony which went to the jury, the executor was entitled to a peremptory instruction for judgment in a sum not less than \$400. Defendant stated in his answer, as may be observed, that he collected \$620, \$220 of which he retained to himself as fees and for money disbursed by himself, alleging, however, that the money was not collected for H. M. Tate, executor, nor for the heirs of Dinah Johnson, deceased. This, upon his own pleading, left \$400 that belonged to some one else than himself. He testified that he had \$400 belonging to the heirs after having deducted his fee in the sum of \$220. On page 15 of the record the following questions and answers appear:

"Q. Now, you collected \$245 in this case and \$220 went for fees and disbursements? A. Yes, sir. Q. Where is the rest of that money now? A. I have got—that is, I have got \$400 that I am keeping for the heirs. Q. In the bank? A. No, sir; I have got \$400, and that's all I have got. Q. You have spent the balance? A. Yes, sir; I spent it. * * *

It is also admitted in the record that H. M. Tate was the duly qualified and acting executor of the estate of Dinah Johnson, deceased. Hence, as defendant confessed in his pleading to have collected \$620, and stated in his testimony that he had collected such amount, \$220 of which he had spent as his own fee, and that the balance he was keeping for the heirs of Dinah Johnson, and H. M. Tate being the executor of the estate of deceased, and, under the statutes, being entitled to the funds received or collected for such estate (section 5347, Comp. Laws 1909 [Rev. Laws 1910, sec. 6301]), we see no error in the court's peremptory instruction against defendant for the \$400.

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The other instruction complained of is as follows:

"In ascertaining the reasonable value of the attorney's fees of defendant in the litigation wherein said fees are claimed, you will consider the nature of the litigation, the amount involved, and the interest at stake, the capacity and fitness of defendant to render said services, the services and labor rendered by defendant, the length of time required to perform same, the benefit received by plaintiff from said litigation in the way of recovery, and you will look to all the evidence in the case, and exercise your sound discretion and judgment thereon, and allow defendant such reasonable amount as you believe he is justly entitled to, not exceeding the sum of \$200, the amount claimed by him."

We are unable to see wherein this instruction would materially prejudice the rights of defendant.

As to the assignment that the court erred in forcing defendant to trial during a term at which the cause had not been regularly assigned for trial, and the assignment of error that the court erred in overruling defendant's motion for a continuance, they might be well taken and considered materially prejudicial to defendant's rights but for the fact that the issues made by the pleadings are settled by defendant's own testimony, the issue being that defendant had certain moneys belonging to the heirs of the estate of the deceased, and defendant's own testimony being that he had collected \$620 for such heirs, \$400 of which he was now keeping for such heirs, and that he had spent the balance as his own fee. Having confessed this in his testimony, the only remaining issue to be tried by the jury was what his services were reasonably worth, and from the verdict returned by the jury it appears that he was allowed \$120 for his services. This may or may not have been an adequate amount to compensate him for his services, but the same was determined by the jury under what we believe an instruction that was fair to defendant, at least, not prejudicial to him.

Hence, upon the entire record as presented here, the judgment of the trial court must be affirmed.

By the Court: It is so ordered.

MIDLAND VALLEY R. CO. v. LARSON.

No. 2917. Opinion Filed January 19, 1914.

(138 Pac. 173.)

1. **DAMAGES—Petition—Sufficiency.** Where the petition, in an action for damages, contains sufficient statements of facts to show the court that plaintiff has sustained a detriment, and the amount thereof, and that defendant had wrongfully caused same, and that it is a detriment for which the law affords redress, such a petition states a cause of action.
2. **PROPERTY—Ownership—Presumption From Possession.** In the absence of evidence to the contrary, a presumption of ownership of real or personal property arises from the possession and control of such property.
3. **CARRIERS—Trial—Demurrer to Evidence—Damages to Shipment.** A demurrer to the evidence admits every fact which the testimony, together with such inferences as may reasonably arise from the surrounding circumstances, reasonably tends to prove; and, in an action for damages, where the testimony, considered in the light of the surrounding circumstances, reasonably tends to show that plaintiff has sustained the amount of damages claimed, and that defendant had unlawfully caused such damages, a demurrer to the evidence is properly overruled.
4. **CARRIERS—Delay in Furnishing Car—Liability—Authority of Agents.** The law does not require that a station agent be authorized to contract with a shipper to furnish a certain kind of car at a certain hour of a certain day, in violation of prescribed rules of the company, and in discrimination against other shippers, but it does require that he be authorized to furnish reasonable facilities within a reasonable time for carrying on the business of the public, either upon his own authority or upon his demand or notice to the company; and, where a car has been demanded by a shipper and promised by an agent, and a reasonable time taken for furnishing same, then, in the absence of satisfactory showing for an unreasonable delay, the company will be held liable for the damages resulting from such delay.
5. **EVIDENCE—Competency—Value of Chattels.** Ordinarily the owner of chattels is qualified, by reason of that relationship, to give his estimate of their value, and where he qualified as knowing the market value of such chattels as hogs, sheep, cattle, and horses, it is not error to permit him to so testify.
6. **EVIDENCE—Competency—Transportation of Shipment—Reasonable Time.** Where a party has been engaged in shipping stock from one point to another over a line of railroad for a period

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of ten years, during which time he shipped some 30,000 head of stock, and states that he knows the reasonable time required for making the trip, he should be permitted to so testify.

7. **CONSTITUTIONAL LAW—Verdict—Number of Jurors Assenting.** “Where the cause of action arose before the adoption of the Constitution, but suit was not filed until afterwards, the constitutional provision permitting a verdict to be returned by three-fourths of the jurors applies.” *C., R. I. & P. Ry. Co. v. Baroni*, 32 Okla. 540, 122 Pac. 926.
8. **APPEAL AND ERROR—Presentation Below—Remarks of Counsel.** Where the remarks of counsel are objected to by opposing counsel and objection is sustained by the court, and no exception is taken to the ruling of the court nor request made that the jury be admonished in reference thereto, a judgment will not be reversed because of the remarks complained of.
9. **TRIAL—Injury to Shipment—Instructions—Measure of Damages.** The giving of the following instructions is assigned as error: “You are instructed that if you find that the plaintiff is entitled to recover for any damages to the sheep by reason of holding them while waiting for the car, as explained in the preceding instruction, such item of damage should be determined by you, finding the market value of the sheep in the condition they were when delivered at the destination, and then finding their market value in the condition they would have been in if the delay had not occurred at the stock pens at Hardy, Okla.; and then the difference between these two values would be the proper amount of damages, as to that item.” **Held**, this instruction, in the light of the entire charge, is not prejudicial to defendant’s rights.

(Syllabus by Harrison, C.)

Error from County Court, Kay County;
Claud Dural, Judge.

Action by Matthew Larson against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edgar A. De Meules and Sol H. Kauffman, for plaintiff in error.

P. W. Cress and H. S. Braucht, for defendant in error.

Opinion by HARRISON, C. This action was begun in the county court of Kay county in March, 1909, by Matthew Larson against the Midland Valley Railroad Company for damages sustained by reason of delay in shipment of fat sheep from Hardy, Okla., to Kansas City, Mo. The cause was tried in February,

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1911, and verdict returned and judgment rendered in favor of plaintiff for the sum of \$331.50, from which judgment and order overruling motion for new trial the railroad company brings error upon 37 separate assignments of error, the first being that the court erred in overruling the demurrer of plaintiff in error to the first cause of action stated by plaintiff below.

The portions of plaintiff's petition complained of by the railroad company which purport to state the cause of action against the railroad company are as follows:

"* * * (2) That on or about the 24th day of February, 1907, plaintiff ordered a car for the shipment of sheep over the defendant's line of railroad from Hardy, Okla., to Kansas City, in the state of Missouri. Plaintiff ordered the said car for shipment from the said station on the 4th day of March, 1907, and plaintiff was advised by the agent in charge of said station that the car so ordered would be placed in position for loading on Monday morning, March 4, 1907.

"(3) Relying upon the advice of said agent, plaintiff drove 243 head of sheep to the station at Hardy, Okla., on March 4, 1907; that when he arrived with the said sheep at the said station the car as ordered had not arrived; that plaintiff was compelled to place the said sheep in stock pens at the station without proper shelter, and away from their accustomed feed lots, to await the car for shipment of the said sheep; that defendant failed to send and place a car for the shipment of said sheep until about the 8th day of March, 1907; that the delay in delivering the said car for the shipment of said sheep compelled plaintiff to hold said sheep in the said pens for over four days, until the 9th day of March, 1907, and the said sheep were greatly reduced in weight, and put in bad condition for shipment and market."

"(7) That by reason of the said negligence of the defendant, its agents and servants, as aforesaid, plaintiff was obliged to and did hire three men and a team five days to care for said sheep after they should and would have been shipped but for the negligence of the defendant as aforesaid, at a cost to plaintiff and to his damage in the sum of \$37.50; that plaintiff was compelled to and did furnish extra feed to said sheep, to wit, twenty bales of hay, worth \$4, and 35 bushels of corn, worth 32 cents per bushel, and of the value of \$11.20."

Plaintiff further alleged that the car was furnished on the 9th, and the shipment delivered on said date for the Kansas

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City market, and that upon arrival at Kansas City notice in writing was given to the railroad company of the damage done to the shipment. Upon refusal of the company to reimburse plaintiff for the damage thus sustained, this action was brought for the sum of \$282.70, and interest at 7 per cent. from the 12th day of March, 1907.

We cannot agree with plaintiff in error that these allegations, considered in connection with the formal statements in the petition, do not contain sufficient statements that plaintiff had sustained a detriment, and that defendant railroad company, through its agents and employees, had wrongfully caused such detriment. This being true, then under section 2882, Comp. Laws 1909 (section 2845, Rev. Laws 1910), Larson was entitled to compensation for the damages thus sustained.

The next assignment of error is that the court erred in overruling the demurrer to the evidence. Plaintiff in error's contention in this regard is based upon his assumption that the testimony failed to show that Larson was the owner of the sheep in question. While it does not appear in the record that Larson anywhere said, in so many words, "These were my sheep," yet from beginning to end of the testimony his testimony is laden with valid inferences that he was the owner of the sheep in question. In fact, no other inference could be drawn from the testimony. He stated: That he had been engaged in feeding sheep for about ten years, during which time he probably had fattened and shipped 30,000 head. That this winter he was feeding 1,500 head. That, a portion of them being ready for shipment, he went in to the agent to ascertain as to when he could get cars; told him about how many he wanted to ship, and the agent told him about when he could have the cars. Relying upon this information, he returned home and began to make preparation for the shipment. That in order to make sure and sustain no loss by carrying his shipment in and finding no car there, he sent one of his men in to know if the car would be on hand, and received the information from the agent through such employee that the car would be on hand. In order to make still more certain in this regard, he sent his son in on the day before

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he took the sheep, to ascertain if the car would be there, and was again informed by the agent that it would be. That thereupon he cut out 245 head of sheep and drove them to town. When he got there the car was not there, and no satisfactory explanation given for its not being there. He was compelled to keep the sheep there for a period of five days in muddy, unsheltered, unfit pens, compelled to buy feed for them and hire hands to feed them. That by reason of this circumstance the sheep sustained great loss in shrinkage of flesh, and that he was put to this extra expense in feeding and caring for them, and that he was damaged by reason of such circumstance in the sum for which the action was brought. From an examination of the record, his ownership in the sheep is conclusive; the question of ownership was never raised. This assignment of error appears to us more frivolous than otherwise, and entirely too theoretically technical to be given consideration here. Besides, the rule is:

"A rebuttable presumption of ownership which, in the absence of evidence to the contrary, the law will assume to be correct arises from possession of real or personal property. Where several persons are in apparent possession, the presumption of title is in favor of him whose acts of control and dominion preponderate." (16 Cyc. 1074, and numerous cases cited in notes.)

Another feature of the second assignment of error is based upon the contention that defendant in error failed to prove ownership in the sheep, and failed to prove that he had been damaged. With this contention we cannot agree. We think the testimony conclusively shows ownership, and specifically shows the damage sustained, and that defendant was the wrongful cause thereof. Besides:

"A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence, and, upon a demurrer to the evidence, the plaintiff is entitled to every inference which the evidence, considered in the light most favorable to him, reasonably tends to prove." (*Anthony v. Bliss*, 39 Okla. 237, 134 Pac. 1122.)

See *Edmisson v. Drumm-Flato Co.*, 13 Okla. 440, 73 Pac. 958; *Shawnee L. & P. Co. v. Sears*, 21 Okla. 13, 90 Pac. 449; *Ziska v. Ziska*, 20 Okla. 634, 95 Pac. 254.

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Considered under the light of this rule, the evidence disclosed by the record is amply sufficient to sustain the judgment.

The third assignment presented is error in refusing peremptory instruction in favor of the railroad company. Under this assignment it is contended that the agent of the company at Hardy had no authority to make the contract which plaintiff alleged was made in reference to the car and the time within which it should be furnished, nor to make any contract other than the printed contract under which the shipment was made. Counsel devotes about twelve pages of his brief citing a number of authorities in support of this contention. In answer to such argument we will say that it is the duty of the railroad company to furnish agents at the stations along its line who are authorized to transact the business of the public, without unreasonable delay. If the railroad company had no such agent at Hardy, then it was derelict in discharging its obligations to the public in not having such a person there. The law does not require that a station agent be authorized to contract to furnish a certain kind of car, at a certain hour of a certain day, in violation of prescribed rules and in discrimination against other shippers, but it does require that he be authorized to furnish reasonable facilities within reasonable time for carrying on the business of the public, either upon his own authority or upon his demands or notice to the company that such facilities are required. This was all that was required by the shipper in the case at bar. He did not demand of the company to furnish a double-deck car on a certain day in violation of prescribed rules, or in discrimination against other shippers, nor did he seek to bind the company to such a contract, but eight days before the shipment he went in to consult the agent about when he could get such a car as he needed. The agent informed him that he could get same about eight days from that date. This number of days was considered, both by the agent and the shipper, to be a reasonable time in which to obtain the cars. Plaintiff relied upon the agent's statements, and had a right to rely upon same, and, relying upon such statements, returned to his ranch and began preparations for ship-

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ment on the day mentioned. However, as stated before, within a few days before the day for the arrival of the car, he sent one of his men in to know if the car would be there, and was informed that it would be. On the day before he cut out his sheep and drove them in, he sent his son in again to inquire of the agent, and was again informed that the car would be set for him. Instead of this, the car did not arrive for five days thereafter, during which time he was compelled to keep his sheep in unsheltered pens where he was delayed, sustaining the loss by shrinkage complained of. Under the record before us, especially in the absence of any showing to the contrary, the eight days was a reasonable time within which to furnish the car required, and the five days' delay thereafter, in the absence of any showing to the contrary, was an unreasonable delay, and the jury was justified in so finding.

In *Midland Railroad Co. v. George*, 36 Okla. 12, 127 Pac. 871, which was an action against the railroad company for failure to furnish cars at the time promised in an oral agreement by the station agent, the first paragraph of the syllabus is as follows:

"Where a railroad company, by oral agreement with its agent, promises to furnish cars at a certain time, and on account of its failure to do so the freight fails to connect with the train on a connecting carrier, and the freight is damaged by the delay, the company is liable for actual damages caused by the delay."

The next assignment argued is error in admitting incompetent evidence. The testimony complained of is that plaintiff, Larson, was permitted to testify as to the market value of the sheep at Hardy on the day they were brought in and on the day they were shipped out, and also as to the market value of such sheep on the market at Kansas City on the day they would have reached the market, if transported with reasonable dispatch, and the day on which they did reach the market; and there was the further objection that the witness was permitted to testify as to what was a reasonable time for transportation from the point of shipment to the point of destination.

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In the first place, the market value of domestic animals, such as horses, sheep, cattle, and hogs, is not such a subject as to be brought within the strict rule for receiving expert testimony. Values of this character are so easily and ordinarily understood that any one who knows should be permitted to testify. We can see no reason for it, nor any common sense, in applying the strict rule for expert testimony to testimony of this character. The witness in question stated that he did know the market value, and then he testified what such value was. Besides, it appears that he had been engaged in feeding sheep for the market for about ten years, during which time he had fattened and shipped some 30,000 head; had closely studied the method of handling, the method and amount of feeding, the nature and qualities of the sheep, and had kept himself posted as to market values. The rule is well settled that the owner of chattels is qualified, by reason of that relationship, to give his estimate of their value. 17 Cyc. 112 to 116, and authorities cited in notes. It does not require experts, within the strict meaning of the rule, to testify to matters of this character. This is a character of knowledge which may be obtained and is generally known by even the most ordinary persons. In *Yates v. Garrett*, 19 Okla. 449, 96 Pac. 142, an expert witness is defined as "one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons." Knowledge of the market value of domestic animals of this character is too generally known, especially by persons engaged in such business, to be brought within the strict rule of expert testimony.

Likewise his knowledge as to the time it usually took, under ordinary circumstances, to make the trip from Hardy, Okla., to Kansas City was a matter which might be well understood, well known by any person engaged in the shipping business as long as this witness had been engaged. We think the testimony was correctly admitted, the witness having stated that he knew the market value of the stock and the time which, under ordinary circumstances, was required for transporting same from the point of shipment to the point of destination.

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The next assignment is that the court erred in giving the following instruction:

"You are instructed that if you find that the plaintiff is entitled to recover for any damage to the sheep by reason of holding them while waiting for the car, as explained in the preceding instruction, such item of damage should be determined by you finding the market value of the sheep in the condition they were when delivered at the destination, and then finding the market value in the condition they would have been in had the delay not occurred at the stock pens, at Hardy, Okla.; and then the difference between these two values would be the proper amount of damage as to that item."

See *St. L. & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

This instruction, considered in connection with other instructions given, cannot be said to have been prejudicial to the substantial rights of plaintiff in error.

The next objection is that the court erred in instructing the jury that three-fourths of their number might return a verdict. In the first place, plaintiff in error could not have been prejudiced by this instruction, for the reason that the verdict returned was a unanimous one; but, aside from this, in the case of *C., R. I. & P. Ry. Co. v. Baroni*, 32 Okla. 540, 122 Pac. 926, this court held:

"Where the cause of action arose before the adoption of the Constitution, but suit was not filed until afterwards, the constitutional provisions permitting a verdict to be returned by three-fourths of the jurors applies."

See *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 385, 120 Pac. 969; *St. L. & S. F. R. Co. v. Ramsey*, 37 Okla. 448, 132 Pac. 478. The same rule obtains in *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 385, 120 Pac. 969, and the case at bar comes within the rule of these two cases.

The next objection to be considered is to certain remarks made by plaintiff's counsel to the jury, but it appears from the record that the remarks were objected to by counsel for the defendant at the time and the objection sustained by the court. Counsel saved no exception either to the argument or to the ruling of the court, and the question, therefore, is not before this court for review. There being no proper exception to the re-

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marks complained of at the time, nor any exception taken to the ruling of the court thereon, the question is not properly before this court for review. See *Coalgate Co. v. Bross*, 25 Okla. 244, 107 Pac. 425, 138 Am. St. Rep. 915; *Kaufman v. Boismier*, 25 Okla. 253, 105 Pac. 326; *Gann v. Ball*, 26 Okla. 27, 110 Pac. 1067; also *Johnson v. U. S.*, 2 Okla. Cr. 17, 99 Pac. 1022; *Thacker v. State*, 3 Okla. Cr. 485, 106 Pac. 986; *Johnson v. State*, 5 Okla. Cr. 13, 113 Pac. 552; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944; *Baker v. Tate, Executor, ante*, 138 Pac. 171.

The remaining question to be determined is the assignment that the court erred in overruling motion for a new trial, but the propositions involved in the motion for new trial have been disposed of under the other assignments herein determined.

We find no material error in the record. Hence the judgment of the trial court is affirmed.

By the Court: It is so ordered.

ST. LOUIS & S. F. R. CO. v. CHESTER.

No. 3174. Opinion Filed January 19, 1914.

(138 Pac. 150.)

1. **RELEASE—Personal Injuries—Fraud.** This court will not hesitate to set aside and avoid a release from damages in a personal injury case, where same has been obtained through fraud or misrepresentations upon the part of the defendant which have misled the injured party into signing same. But where the grounds relied on to avoid a written contract of settlement and release are fraud and misrepresentations in its procurement, the evidence as to the particular facts constituting the same should be clear and convincing.
2. **SAME—Right to Avoid—Grounds.** A written contract cannot be avoided on slight or frivolous grounds.
3. **COMPROMISE AND SETTLEMENT—Validity and Enforcement.** It is the policy of the law to encourage the settlement and compromise of controversies as a discouragement to litigation.

(Syllabus by Brewer, C.)

Error from County Court, Marshall County;
A. H. Ferguson, Judge.

St. Louis & S. F. R. Co. v. Chester.

Action by Joel Chester against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, for plaintiff in error.

F. E. Kennamer and Chas. A. Coakley, for defendant in error.

Opinion by BREWER, C. The defendant in error, Joel Chester, who will be called plaintiff, was in Madill, Okla., on the night of August 21, 1908, and was injured by being struck at a crossing by a box car, knocking him down. Plaintiff had been drinking some, and at the suggestion of the city marshal had gone off the street into a hotel. Hearing a train whistle, he ran out to go to the depot to take a train to the next station. Between the hotel and the depot he had to cross a side track. A box car was being backed along this track to the ice plant. The conductor walked across the crossing between the hotel and depot, ahead of the box car, and was several yards in front of the moving car. A brakeman was on the front end of the moving car, with a lantern. As the plaintiff was about to walk in front of the car, the brakeman hallowed at him, and signaled for a stop, but he either did not hear or did not heed, and was struck. He was taken to the hospital, and his arm had to be amputated. He was then removed to the hospital at Sherman, Tex., where he remained until he recovered.

About a week after plaintiff was hurt, defendant's claim agent called on him and offered to talk settlement. Plaintiff refused to consider a settlement at that time. On September 21, 1908, after plaintiff had been able to be up a couple of weeks and was about ready to leave the hospital, the plaintiff indicated to his physician that he wanted to talk settlement, and the claim agent, Mr. V. E. McInnis, a lawyer of Oklahoma City, went to Sherman and saw the plaintiff, and made a settlement of the claim for \$300, and secured from plaintiff a release in full of all claims for damages on account of the injury.

On October 18, 1910, this suit was brought, alleging negligence on the part of defendant as the cause of the injury, and

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claiming damages in the sum of \$1,995. The defendant answered by general denial and set up the release as a complete bar to a recovery. The plaintiff filed a reply alleging fraud, misrepresentation, and deceit in the procurement of the release. The jury found for plaintiff in the sum of \$1,650.

The defendant demurred to the evidence as not being sufficient to show either negligence on the part of defendant or fraud or misrepresentation in the procurement of the settlement and release. These points are urged here.

We have carefully scrutinized every word of the evidence, and it utterly fails to show either fraud or misrepresentation upon the part of the claim agent, or any other just, sufficient, or lawful reason why plaintiff should be allowed to avoid his contract of settlement.

This court has evinced no hesitancy in setting aside releases in personal injury cases, when procured by fraud and misrepresentations as to material matters, or for other reasons sufficient in law, as may be observed by a reference to the following cases: *St. L. & S. F. R. Co. v. Richards*, 23 Okla. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; *St. L. & S. F. R. Co. v. Nichols*, 39 Okla. 522, 136 Pac. 159; *Herndon v. St. L. & S. F. R. Co.*, 37 Okla. 256, 128 Pac. 727; *St. L. & S. F. R. Co. v. Read*, 37 Okla. 350, 132 Pac. 355.

But this does not mean that a contract, fairly and honestly entered into, can be avoided for slight or frivolous reasons. Indeed, the rule is quite to the contrary. The law and the public policy of all civilized countries, so far as we have observed, favors settlements and compromises, entered into fairly and in good faith between competent persons, as a discouragement to litigation. Indeed, when persons have a dispute and get together and consider and weigh the facts out of which it arises, and then come to an agreement, fairly and honestly made, and reduce same to writing, should either of such parties later undertake to repudiate and avoid its terms, the evidence he offers, to be sufficient, must be clear and convincing. Such evidence will generally rest in parol, and, if the person seeking to avoid his written contract has been the victim of fraud or misrepresentations

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sufficient to afford him relief, it is not difficult to produce, nor is it a harsh rule to require, the evidence to point out the fraud, or false statement of fact, or other reasons relied on, so that it can be clearly seen by the court or jury that the contract should not stand.

"In the case of *Mateer v. Railway Co.*, 105 Mo. 320, 16 S. W. 839, the court said: 'The law favors the compromise and settlement of disputed claims. It is to the interest of the commonwealth that there should be an end to litigation. If those settlements, fairly made and entered into, are to be disturbed upon frivolous grounds, it will often deter these companies from doing justice to their employees, who have received injuries, for fear of future litigation. A wise policy would dictate that they be encouraged to do justice in these cases outside of the courts, and that their settlements should be sustained when they are just and fair.'"

"In the case of *Chicago & A. Ry. Co. v. Green* [C. C.] 114 Fed. 682, the court said: 'And I may add that, if such settlements are to be disturbed because of the impression the judge may entertain that the amount of compensation was inadequate, it would establish a most uncertain and dangerous rule of law. If the employer, believing from the facts in his possession that there was no legal liability for the injury sustained by his employee, nevertheless recognizes a moral obligation to contribute aid of a substantial character to the unfortunate, under the circumstances surrounding his situation at the time, and the employee is willing to accept it, before a court takes upon itself the function of undoing such settlements, the evidence of fraud or incapacity ought to be made clear and persuasive.'"

(34 Cyc. 1103; *Lomax v. S. W. Mo. Elec. R. Co.*, 119 Mo. App. 192, 95 S. W. 945; *Bierer's Appeal*, 92 Pa. 265; *Pederson v. Seattle St. Ry. Co.*, 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; *Wallace v. Skinner*, 15 Wyo. 233, 88 Pac. 221; *St. P., M. & O. Ry. Co. v. Bellinwith*, 83 Fed. 437, 28 C. C. A. 358; *Southern D. Co. v. Silka*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 681; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 250; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 36 L. Ed. 931; *Clark v. Reeder*, 158 U. S. 505, 15 Sup. Ct. 849, 39 L. Ed. 1070.)

In this case the plaintiff had practically recovered; the extent of his injury was fully known; a month had elapsed, so that the liability, or want of liability, of the defendant could have been

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fully investigated. The shock of the injury and its attending circumstances were over. No unseemly haste had been used. Earlier plaintiff had declined to consider a settlement; when he became so inclined the agent came to see him. They began negotiating about 10 o'clock a. m. The plaintiff made large demands. At noon no agreement had been reached; after dinner the matter was resumed until 3 o'clock, when they agreed on the amount. The papers were drawn and taken to a notary public in another building, where the same were read to and carefully explained to plaintiff. He expressed satisfaction and signed them and received the money, and then sent for a tailor to take his measure for and make him a suit of clothes. Plaintiff then spent the rest of his money and two years later filed suit. No act of fraud is shown. The plaintiff merely says: "I did not understand this legal document. I do not know the meaning of certain words used"—such as "settle," "apparent," "compromise"—and yet he admitted that he could speak and write the English language; that he owned and managed his own lands and had required written leases from his tenants. He stated that on the morning of the settlement he was shown some whisky, and drank of it, but he admitted it was in another room from where he met and negotiated with the agent; that the agent did not see him drink or give him the whisky, or know anything about it, or that he had used it; and that the settlement was not concluded for nearly five hours after he took the drink, and that he had drunk no more in the meantime, and was at no time drunk. The only representations it is claimed the agent made were that the agent stated that plaintiff's right to recover was to his mind doubtful; and that he had been informed that plaintiff was drinking when hurt. These statements were both true. From this record the gravest doubt arises as to his right to recover. All the proof shows that he was drinking when hurt. The city marshal had told him he was too drunk to stay on the street and pushed him into the hotel from which he started to the train. The plaintiff says he was drinking "Longhorn," whatever that may be. No claim is made that the release was falsely read, or only partially read, or that any improper influences were brought to bear to induce him to sign it.

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If this settlement can be repudiated under the evidence, it would be indeed rare to find one that would stand; and the defendant would be foolish to further undertake to make settlements with claimants. The evidence having been fully developed and being wholly insufficient, no good purpose will be served in prolonging this litigation.

The cause should, therefore, be reversed and rendered here. By the Court: It is so ordered.

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Nos. 3190 and 3896. Opinion Filed January 19, 1914.

(138 Pac. 154.)

1. **HUSBAND AND WIFE—Alienation of Affections—Burden of Proof—Good Faith.** In an action by either the husband or wife against the parents of the other for alienation of affections, it must appear that there had been a direct interference on defendants' part sufficient to satisfy the jury that the alienation was caused by the defendants, and the burden of proof is upon the plaintiff to show such interference.

And where the father or mother is charged with the alienation, the *quo animo* is said to be the important consideration, although it appears that a parent directly interferes, as by giving to a son or daughter advice on his or her domestic affairs, and the other will have no cause of action against the parent, though the result of the parent's action is the alienation of the husband's or wife's affection, if such parent acts in good faith; and the motive of the parent in such case is presumed to be good until the contrary is proved.

2. **SAME—Quantum of Proof.** "In actions against parents of either the husband or wife of the plaintiff, a much stronger rule prevails concerning the burden of proof, and plaintiff must not only show improper motives of the parents, but that the alienation was, in a sense, maliciously brought about. Where the action is against a stranger, the plaintiff need only show that it was wrongfully brought about."
3. **SAME—Declarations.** The rule of evidence is that the declarations of the husband, made in the absence of the defendant, as to the cause of his abandoning or putting away his wife, are not admissible, nor the declarations of the wife, in an action for enticing away the wife.
4. **SAME—Ground for Reversal—Admission of Evidence.** "The admission of incompetent and immaterial evidence that appears to

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have prejudiced the substantial rights of the party objecting to the admission thereof is reversible error." **Meek v. Daugherty**, 21 Okla. 859, 97 Pac. 557.

5. **SAME—Hearsay Evidence.** "Hearsay evidence having been admitted on the trial, which was liable to inflame the minds of the jury and prejudice them against the losing party, will cause reversal on review in this court." **Bash v. Howald**, 27 Okla. 462, 112 Pac. 1125.

(Syllabus by Harrison, C.)

*Error from Superior Court, Muskogee County;
Farrar L. McCain, Judge.*

Action by Evelyn McKellop against Susie Brison and another. Judgment for plaintiff, and defendants bring error, and from a denial of their petition for a new trial for newly discovered evidence, they appeal. Reversed and remanded.

N. A. Gibson (W. G. Robertson, of counsel), for plaintiffs in error.

S. M. Rutherford, Bailey, Wyand & Moon, and Alvin F. Molony, for defendant in error.

Opinion by HARRISON, C. No. 3190 was an action by Evelyn McKellop against Susie and W. M. Brison for damages for willfully and maliciously alienating the affections of her husband, Guy McKellop. Susie Brison was the mother, and W. M. Brison the stepfather, of Guy McKellop. The cause was tried in March, 1911, and judgment rendered in favor of Evelyn McKellop in the sum of \$10,000, \$5,000 of which were for actual and \$5,000 for exemplary damages. This judgment was appealed from by Susie and W. M. Brison, and the cause filed in this court October 19, 1911. Before the appeal was filed, however, to wit, on July 3, 1911, Susie and W. M. Brison, defendants below, filed a petition for a new trial on the grounds of newly discovered evidence, and from the judgment of the court at a later date denying a new trial, they appeal to this court, such cause being No. 3896, and by agreement the two causes are consolidated.

While a determination of the questions presented in No. 3190 are to an extent affected by the subsequent developments in No.

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3896, yet in order to dispose of the questions presented in each case clearly, we will first consider those presented in No. 3190. There are a number of assignments of error contended for; but as there are some decisive propositions involved, a determination of which disposes of the other assignments, we will not notice each assignment separately.

To begin with, let it be borne in mind that the action was brought against defendants for willfully and maliciously alienating the affections of plaintiff's husband and causing divorce proceedings. In cases of this character it is well settled as a general rule, and we think a wise and just one, that recovery cannot be had unless it appears, either from positive testimony or by strong valid inference, that the acts complained of were inspired by malice; that the motive was willful and malicious. See 21 Cyc. 1619, 1620; 15 Am. & Eng. (2d Ed.) 66, 67; 3 Elliott on Ev. sec. 1643, and cases cited in notes supporting the text in each of the above authorities. Also *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; *Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322; 9 Ann. Cas. 958; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460; *Cornelius v. Cornelius*, 233 Mo. 1, 135 S. E. 65; *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989; *Beisel v. Gerlach*, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516.

It is also a fundamental principle of pleading that the burden is upon the plaintiff to prove the facts necessary to a recovery, and in actions of this character, especially in actions by either the husband or wife against the parents of the other, the burden is heavier, and the degree of proof required stronger, than in ordinary actions, or even in actions of this character against a stranger. Elliott on Ev. (volume 3, sec. 1643) says:

"In actions against parents of either the husband or wife of the plaintiff, a much stronger rule prevails concerning the burden of proof, and plaintiff must not only show improper motives

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of the parents, but that the alienation was, in a sense, maliciously brought about. Where the action is against a stranger, the plaintiff need only show that it was wrongfully brought about."

In *Hutcheson v. Peck*, *supra*, Chief Justice Kent of the Supreme Court of New York said:

"I am also for a new trial. If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest; this is the first action of the kind I have met with, brought against the father. A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent, and they unable to maintain themselves; and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband, from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband."

In *Multer v. Knibbs*, *supra*, the Supreme Court of Massachusetts said:

"In an action of this kind, brought by a husband against the father of his wife, upon the allegations that the defendant has enticed the plaintiff's wife away from him, alienated her affections, persuaded and induced her not to live with him, and has harbored, secreted, and concealed her, it is not (as it might be in an action against a stranger) enough to show that the defendant actually has performed the acts charged, and that they have resulted in an abandonment of the plaintiff by his wife. There is a material difference between the acts of a parent and those of a mere intermeddler. Even in the latter case, a defendant may disprove any intent on his part, in advising the wife, to cause a separation, and may show that his advice was given honestly. *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417 [10 L. R. A. 468]. But the rights and the corresponding duties of

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a parent are much greater than those of a stranger, and much stronger evidence is required to maintain an action against him. * * * And the burden is upon the plaintiff to show that the defendant has been prompted by malice in what he has said and done, and to overcome the presumption that he acted under the influence of natural affection, and for what he believed to be the real good of his child. *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Pollock v. Pollock*, 9 Misc. Rep. 82, 29 N. Y. Supp. 37; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Westlake v. Westlake*, 34 Ohio St. 621 [32 Am. Rep. 397]; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320 [70 Am. St. Rep. 574]; *Young v. Young*, 8 Wash. 81, 35 Pac. 592; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638 [51 Am. St. Rep. 310]."

"Direct Act of Interference.—In order to sustain an action for the alienation of the husband's affections it must appear, in addition to the fact of alienation or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is on the plaintiff to show such interference.

"Actions Against Husband's Parents.—A distinction seems to be made between an action against a stranger and an action against the parents of the husband. Where the father or mother is charged with the alienation, the *quo animo* is said to be the important consideration. Parents are under obligation by the law of nature to protect their children from injury and relieve them when in distress, and this obligation is recognized by the common law. Accordingly it appears that, though a parent directly interferes, as by giving to his son advice on his domestic affairs, the wife will have no cause of action against the parent, though the result of his action is the alienation of the husband's affections, if he acts in good faith; and the motive of the parent in such case is presumed to be good until the contrary is proved." (15 Am. & Eng. Enc. of Law, 865, and notes cited.)

Thus the burden was upon the plaintiff to prove, not only that her husband's affections were alienated, and that they were alienated by the defendants, but that they were alienated through malice. These were the issues which plaintiff tendered, and the issues which the law required her to maintain; and the burden was upon her to maintain same by a preponderance of competent testimony in order to recover.

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This brings us to the decisive question involved in the trial, namely, the contention that incompetent testimony was admitted. The plaintiff was permitted, over the objection of defendants, to state what her husband had told her that his mother had said to him; such statements having been made some three months after the separation between plaintiff and her husband, and in the absence of either of defendants. Mrs. Olive Hammer, mother of plaintiff, was also permitted to testify to similar statements made by the husband. It is contended, however, by counsel for defendant in error, that the testimony of Mrs. Olive Hammer was not properly excepted to; that when Mrs. Hammer, mother of plaintiff, was called to the stand, and asked as to conversations she had had with plaintiff, counsel for defendants stated to the court, "This goes in under our objection," and the court replied, "All of this testimony is admitted for the one purpose only, which I have stated," the reason given by the court, "I am admitting this for the purpose of showing his feelings toward her." But it is unnecessary to determine that question here, for, aside from the testimony of Mrs. Olive Hammer, the testimony of plaintiff herself, which was duly excepted to, was clearly incompetent and decidedly prejudicial to the rights of defendants.

In *Westlake v. Westlake*, 34 Ohio St. 634, 32 Am. Rep. 397, which was an action by the wife against the parents of her husband, the Supreme Court of Ohio said:

"Did the court err in admitting the declaration of the husband, made in the absence of the defendant, to the effect that the defendant was doing all he could to bring about a separation between the plaintiff and her husband? We think it did. This was clearly hearsay testimony, and nothing else. In an action for enticing away the plaintiff's wife, the declarations of the wife are not admissible in evidence. *Winsmore v. Greenbank*, Willes, 577. The confessions of the wife, in an action by the husband against her seducer, are not evidence against the defendant. Bull. N. P. 28. So, in an action against a third party for inducing the plaintiff's husband to send her away, the declarations of the husband, made in the absence of the defendant, are not admissible in evidence. Did the court err in refusing to charge that, to entitle the plaintiff to recover, the defendant

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must have maliciously caused the separation of the husband and wife? This charge ought to have been given. * * * For error in admitting the declarations of the husband, and in refusing to charge as requested, the judgment must be reversed, and the cause remanded to the court of common pleas for a new trial."

This has become the general rule in such cases. See *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460.

In 1 Enc. of Ev. the rule is stated thus:

"Except as hereinbefore stated, the declarations of the husband, made in the absence of the defendant, as to the cause of his abandoning or putting away his wife, are not admissible, nor the declarations of the wife in an action for enticing away the wife." (Page 749 and authorities cited in notes.)

Hence, inasmuch as this testimony was inadmissible, and this court being unable to estimate the extent to which it prejudiced the substantial rights of defendants, and being unable to say what the verdict would have been with this incompetent testimony eliminated, we must abide by the rule heretofore settled by this court that:

"The admission of incompetent and immaterial evidence, that appears to have prejudiced the substantial rights of the party objecting to the admission thereof, is reversible error." (*Meek v. Daugherty*, 21 Okla. 859, 97 Pac. 557.)

"Hearsay evidence, being admitted on the trial, which was liable to inflame the minds of the jury and to prejudice them against the losing party, will cause reversal on review in this court." (*Bash v. Howald*, 27 Okla. 462, 112 Pac. 1125.)

Also *Jackson v. Thornton*, 8 Okla. 331, 58 Pac. 951; *Barnett v. Ruyle*, 9 Okla. 635, 60 Pac. 243; *Boise v. A., T. & S. F. Ry. Co.*, 6 Okla. 243, 51 Pac. 662.

It is also contended that the substantial rights of defendants were prejudiced by plaintiff, while a witness on the stand, being asked by her counsel the following:

"Q. You say I advised you to bring this suit. I will ask you if you didn't advise with me as to what you were going to do, as to whether you had damages in the matter, or could get damages? A. Yes, sir. Q. I will ask you if I didn't advise you

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that you had a cause of action against Mrs. Brison for alienating the affections of your husband? A. Yes, sir."

This testimony was also admitted over the objection of defendants, and duly excepted to. We agree with counsel for plaintiffs in error that this testimony was at least "calculated to prejudice the defendants in the eyes of the jury." It is impossible to say what effect it may have had on their minds. It is not unreasonable to suppose that the private opinion of an attorney who is well known and esteemed by the jurors of his county, who has a reputation as a man of honor, as well as a lawyer of ability and learning, would have more or less influence with the jury. It is true the court in overruling the objection to this testimony said, "I will permit it as a matter of personal privilege," but we are unable to see wherein the reasons given by the court would cure the injury which such testimony might probably have inflicted. We should consider it a very unsafe rule to allow each attorney in every case to testify as to what his private opinion was of the merits of the case. Such a rule might ultimately lead to a mere weighing of the opinions of attorneys, or possibly to a mere test of their veracity, either of which cases might give rise to embarrassing circumstances. Now, the admission of this testimony, being considered in the light of the fact that there was some evidence which tended to show that the whole trouble between plaintiff and her husband grew out of some alleged improper relations on her part with one Throckmorton, and as there is no testimony whatever that even tends to show that the defendants, the parents, ever interfered with the domestic affairs of Evelyn and Guy, or in any way advised them to separate until after the discovery of such supposed improper relations, the jury might, in the absence of the incompetent testimony which was admitted, have concluded that whatever part the defendants did take in the matter was prompted solely from a parental care for the welfare of their son and the good name of their grandchildren; and this condition of the case being viewed in the light of the fact that the subsequent petition for new trial was supported by affidavits of fourteen of her nearest neighbors tending to show that Evelyn's relations with Throck-

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morton had, for more than a year, been very improper, and considering the motives in the former case, and viewing them in the light of the evidence tendered in the latter case, we believe a new trial should have been granted.

The judgments are therefore reversed, and the two causes remanded for consolidation and retrial.

By the Court: It is so ordered.

ST. LOUIS & S. F. R. CO. v. WALKER.

No. 2336. Opinion Filed January 19, 1914.

(138 Pac. 144.)

On rehearing. Affirmed.

For former opinion, see 37 Okla. 784, 133 Pac. 185.

PER CURIAM. Since the original opinion was handed down in this cause, the defendant in error has filed with the clerk of this court a *remittitur* in the sum of \$200, as required in the original opinion. Upon consideration of the petition for rehearing, it has been determined that the original opinion filed herein should be adhered to, and that the petition for rehearing should be denied, and the judgment appealed from, when credited with the amount of the *remittitur*, should be affirmed.

By the Court: It is so ordered.

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McWHORTER v. BRADY *et al.*

No. 2891. Opinion Filed November 18, 1913.

Rehearing Denied February 3, 1914.

1. **LIS PENDENS—Notice.** The doctrine of **lis pendens**, under the common law, was based on the theory of public policy, while, under the statute, it is treated as an element of the law of notice.
2. **SAME—Elements of.** It is essential to the existence of a valid and effective **lis pendens** that three elements be present, viz.: First, the property must be of a character to be subject to the rule; second, the court must have jurisdiction both of the persons and the **res**; third, the property or **res** involved must be sufficiently described in the pleadings.
3. **SAME—Description—Notice—Sufficiency.** Record examined and held, under the circumstances of the case, the property was sufficiently described, and that the law relating to **lis pendens** was substantially complied with.
4. **HUSBAND AND WIFE—Homestead—Conveyance—Validity.** A homestead, the title to which is in the husband, cannot be sold or otherwise alienated by the husband, without the wife joining in the conveyance, unless the wife has voluntarily abandoned the husband, or, for any cause, has taken up her residence out of the state for a period of one year or more. A deed to a homestead, executed by a husband, without such abandonment or removal of residence on the part of the wife, is void.
5. **HOMESTEAD—Title—Conveyance—Validity.** Where, in a divorce case, a decree had been denied both parties, but the wife had been enjoined from interfering with the husband's possession of the homestead, she was not thereby divested of her right or title to and in the homestead, but was yet the legal wife of the husband, and any attempt by the latter to sell the homestead without the wife's consent or without her joining in the conveyance, was void.
6. **SAME—Wife Necessary Party to Conveyance.** Facts examined and held, that plaintiff in error has no title or color of title in and to a homestead attempted to be conveyed by the husband without being joined in the conveyance by the wife.

(Syllabus by Robertson, C.)

*Error from District Court, Beckham County:**John J. Carney, Judge.*

Action by Ellen Brady, and Elmer Brady, Johanna Brady, Adda Lillian Brady, and Bunyon Francis Brady, minors, by

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guardian *ad litem*, against R. S. McWhorter, to recover possession of real estate. Judgment for plaintiffs. Defendant brings error. Affirmed.

Geo. L. Zink and J. H. Cline, for plaintiff in error.

Jno. B. Harrison and Arthur Leach, for defendants in error.

Opinion by ROBERTSON, C. This is an action, in the nature of ejectment, by Ellen Brady and Elmer Brady, Johanna Brady, Adda Lillian Brady, and Bunyon Francis Brady, minors, against R. S. McWhorter to recover possession of certain described real estate in Beckham county, Okla. It appears from the record that J. H. Brady and Ellen Brady were husband and wife; that the land involved in this controversy was a government homestead which had been filed upon, and proved up, by Brady. On July 3, 1908, Ellen Brady brought suit in the district court of Beckham county against J. H. Brady for divorce, on the grounds of habitual drunkenness and cruel and inhuman treatment, and therein asked for the custody of their four minor children, and for an equitable division of their property, including the homestead, and also sought to enjoin her husband from selling or disposing of any of their property until the termination of the suit. The husband, J. H. Brady, was duly served with summons on the 8th day of July, 1908, and return thereof was made and filed on the same day. On July 10, 1908, two days later, the husband attempted to sell and convey the homestead by warranty deed to R. S. McWhorter, the plaintiff in error herein. It appears from the record that the wife had no knowledge of this conveyance, except the constructive knowledge that the recorded deed would give her, and it also affirmatively appears that she did not join her husband in the execution of the deed to McWhorter. The action for divorce was tried January 29, 1909, and the wife was given a decree of separation, the custody of the minor children, and the possession of the homestead, that being all the land owned by the parties at the time. In said divorce decree, the husband, J. H. Brady, was perpetually enjoined and barred of any and all right of possession to the homestead, until the further order of the court.

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On July 29, 1909, the plaintiff in error, being in possession of the land by tenant, and refusing to give possession, was made defendant in this suit for possession by Ellen Brady. The plaintiff in error answered by general denial and cross-petition. Prior to the trial it was made to appear to the court that the minor children of Ellen and J. H. Brady had an interest in the tract of land, whereupon the court ordered them made parties to the action and appointed a guardian *ad litem* for them, who appeared and filed a general denial for them. The cause was tried in February, 1911, and resulted in a judgment in favor of the plaintiff and her minor children, for the possession of the land in controversy, until the further order of the court.

In addition to the above facts, it is also gathered from the record that the land in controversy, prior to statehood, was situated in Greer county; that by virtue of the provisions of the Constitution, creating Beckham county, the tract, after statehood, was situated in said Beckham county; that the said J. H. Brady made final proof and received his final receipt covering said tract of land on the 15th day of March, 1905, said final receipt being recorded in Greer county, on April 1, 1906, and the patent from the United States covering said tract of land was issued to the said Brady on October 10, 1905, the patent also being recorded in Greer county on the 6th day of April, 1906. It is also disclosed by the record that the relations between Brady and his wife were anything but amicable; that they frequently quarreled and also that they had separated several times, one separation occurring in the summer of 1906, when the wife left her husband on account of his cruel treatment. The evidence shows that thereafter she returned to the husband and, as an inducement to secure her return, he offered to, and did, deed her on April 10, 1906, the north half of the homestead; this deed was recorded in Greer county, Okla., on August 2, 1906; on the same day the wife made, executed and delivered to him her warranty deed, conveying thereby the south half of the same tract of land, which deed was also recorded in Greer county, Okla. Shortly after this exchange of deeds, the parties separated again. This was the final separation. On April

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3, 1906, Brady brought suit against his wife for divorce in the district court of Greer county; on May 3, 1907, the wife appeared and filed her answer and cross-petition. Brady charged his wife, in the petition for divorce, with abandonment; the answer in the cross-petition by the wife charged cruelty and habitual intoxication; the cause was tried before the district court of Greer county on May 15, 1907, and both parties were denied a divorce; on the 16th day of May, 1907, the next day after the decree had been entered in the divorce case as last aforesaid, J. H. Brady, the husband, commenced an action in the district court of Greer county against the plaintiff, Ellen Brady, his wife, the object and purpose of which was to cancel the warranty deed he had theretofore executed to her, conveying the north half of the homestead; personal service of summons was had on the plaintiff and on the same day the district court issued a restraining order against Ellen Brady, the wife, restraining her from selling or disposing of the north half of said tract of land until the action to cancel the deed could be heard and determined, and, also, restraining her from interfering with the possession of J. H. Brady, her husband, in the cultivation of a crop on said land. Default was made by Ellen Brady in this cause, and, on August 16, 1907, a judgment was entered against her and in favor of her husband, perpetually restraining Ellen Brady from interfering with her husband, J. H. Brady, in and to the whole of said land and cancelling the deed from the husband to the wife and divesting the title from the said Ellen Brady and *vesting the same in the husband and father, J. H. Brady, as trustee, for the minor children of said marriage.* No appeal was ever taken from this decree by either party.

From the judgment against McWhorter in favor of Ellen Brady, as entered by the district court of Beckham county in February, 1911, giving her the possession of the land, the defendant, McWhorter, appeals and assigns as error, "that the judgment and decision of the court below is not sustained by sufficient evidence and is contrary to law."

Under this assignment of error several questions are raised by plaintiff in error in his brief, the first of which is that the

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description of the premises in the petition of Ellen Brady for divorce was insufficient to constitute *lis pendens*, and that, therefore, plaintiff in error had no legal notice of the pending divorce suit and is an innocent purchaser, etc.

The paragraph in the divorce petition which deals with the description of the land reads as follows:

"That plaintiff has a homestead of 160 acres of land situated near Erick in Beckham county, Oklahoma, of the value of about \$3,500; that final proof has been made on said tract, that said homestead was filed upon, improved and put in cultivation by the joint efforts and labor of plaintiff and defendant."

The sections of our statute dealing with the subject are 4732 and 4733, Rev. Laws 1910, the first of which reads as follows:

"Section 4732. When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition.

"Sec. 4733. When any part of real property, the subject-matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the office of the register of deeds of such other county or counties, before it shall operate therein as notice, so as to charge third persons, as provided in the preceding section. It shall operate as such notice, without record, in the county where it is rendered."

The doctrine of *lis pendens*, under the common law, was based on the theory of public policy, while, under our statute, it appears to be treated as an element of the law of notice.

It has been said (25 Cyc. 1451) "that it is essential to the existence of a valid and effective *lis pendens* that three elements be present: (1) The property must be of a character to be subject to the rule; (2) the court must have jurisdiction both of the person and the *res*; (3) and the property or *res* involved must be sufficiently described in the pleadings."

There is no question concerning the first and second elements above named. Let us examine as to the third. In 25 Cyc. 1462, it is said:

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"A purchaser or mortgagee or other person who would otherwise be affected by the rule of *lis pendens* is not affected by the pendency of an action, unless the pleadings therein, at the date of the purchase or the acquisition of rights, describe the property as to which the rule is sought to be applied so as to enable the purchaser or other third person to ascertain its identity. The property is sufficiently described, it would seem, although not described by metes and bounds, if described with reasonable certainty, *that is, if enough is alleged to enable a person upon reasonable inquiry to identify the property and ascertain the object of the suit.*" (Italics ours.)

It is earnestly contended by plaintiff in error in his brief that the statute is no broader than the common-law rule and that the averments of the petition must be so definite that any one on reading it can learn what property was intended to be made subject of recovery. With this contention we cannot fully agree, for that the statutory rule governing *lis pendens* is broader and more comprehensive than the common-law rule, in that the statutory *lis pendens* partaking, as it does, of the nature and doctrine of notice, makes notice the channel or means through, or by which, the real object and purpose of *lis pendens* is attained. We are free to say that the description of the land in this petition is exceedingly vague and ordinarily would be held insufficient in the matter of notice, yet the object and purpose of the statute must be kept constantly in mind, and under the facts and circumstances of this case, if we can say that the plaintiff in error did, in fact, have notice of the situation and of the status of the land at the time he purchased the same, we must sustain the judgment of the trial court.

The statute makes a pending suit constructive notice and requires intending purchasers to exercise a reasonable care and diligence in ascertaining the nature of a pending suit: this requirement is everywhere recognized and abstractors are required to examine the records in the district clerk's office in order to ascertain whether the land, for which they are making an abstract of title, is involved in any pending actions and to so certify if such be the case.

Had plaintiff in error complied with the requirements of the statute, or exercised a reasonable degree of care in the premises,

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he would have found that on July 3, 1908, Ellen Brady had filed her petition in the district court of Beckham county against J. H. Brady, asking for a divorce, and the custody of their minor children, also the possession of their homestead situated near Erick, in said county, which homestead had been filed upon, improved, and deeded by the joint efforts of said Ellen and J. H. Brady; he would also have found that the summons in said divorce case had been served on J. H. Brady and return thereof made and filed in the action on July 8, 1908, two whole days before he purchased the land.

McWhorter in his testimony (Case-made, p. 46) also shows that he had, prior to the purchase, been apprised of the status of the land, or, at least, was in possession of such facts and circumstances as would give a prudent man notice of the condition of the title. He says that he had never seen Brady before; that Brady came to his house one night and the next day the trade was made; that Brady told him he was a married man and had four children; that Brady showed him a decree signed by Judge Irwin, which decree was introduced in evidence, and is in the record, and which shows that Brady had been in a law suit in old Greer county with his wife over the identical piece of land; that he had deeded one 80 to his wife, but that this deed had been canceled for failure of consideration, and that the court had finally decreed the title to said tract in J. H. Brady, *as trustee, for the minor children of Brady and his wife*. In this decree, which McWhorter saw and examined prior to the purchase, the land was properly described, and said decree further showed Ellen Brady was the wife of J. H. Brady, and that the Union Central Life Insurance Company had a mortgage thereon, signed by both Brady and his wife. It is further shown (Case-made, pp. 66, 67) by the record that McWhorter saw and examined the final receipt from the Mangum Land Office, and the patent from the General Land Office at Washington, D. C., all of which showed the land to be the *homestead* of Brady.

The description of the land in Mrs. Brady's petition, standing alone, in our opinion, was not as full and complete as it should have been, yet, in the light of the foregoing facts, it

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was, in our opinion, sufficient to apprise the purchaser of its status and to enable him to identify the same and to ascertain the object of the suit. The failure of McWhorter to examine the records of the district court of Beckham county, and the actual knowledge he possessed prior to the purchase, the decree, and other muniments of the title which he admits he examined, together with his failure to use or exercise any degree of diligence, especially that degree required by law, leads us to say that the law relating to *lis pendens* was substantially complied with and that plaintiff in error's contention to the contrary cannot be sustained.

It is next contended by plaintiff in error that the deed to the land was good with J. H. Brady's signature alone, and that the wife's signature thereto was unnecessary.

Section 1145, Rev. Laws 1910, which was in force at the time this cause was tried, reads as follows:

"Where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one year, or from any cause takes up her residence out of the state, he may convey, mortgage or make any contract relating thereto without being joined therein by her; and where the title to the homestead is in the wife, and the husband voluntarily abandons her, or from any cause takes up his residence out of the state for a period of one year, she may convey, mortgage or make any contract relating thereto without being joined therein by him."

It is thus seen that, before a deed to a homestead signed by one spouse only constitutes a good conveyance, the abandonment must be *voluntary*. In the case at bar, the evidence shows the contrary to be true. This was an issue in the trial below, duly submitted to the court by the parties by the evidence, which was conflicting. The court resolved the question in favor of the wife's contention, and in this there was no mistake. This court will not examine the evidence, where issues of fact are involved, further than to ascertain if there be any evidence reasonably tending to support the finding of the trial court or jury. If such there be, the finding of the court, or the verdict of the jury, will be conclusive on appeal.

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It is next urged that Ellen Brady had no right to a decree of divorce as entered in the district court of Beckham county, for that the district court of Greer county some years prior to the rendering of the last-named judgment, had denied both parties a divorce on the same grounds set up in the petition for divorce in Beckham county, and that the last action in Beckham county required an examination of the identical facts upon which the district court of Greer county denied the divorce, and that, therefore, the questions raised were *res adjudicata*. To this contention it is sufficient to say that the record fails to show that such are the facts; the record does not show affirmatively or otherwise that the same facts examined by the district court of Greer county formed the basis of the divorce action in Beckham county, or whether the district court of Beckham county examined and considered the same facts as were examined and considered by the district court of Greer county, or whether that issue was within the pleadings of the Greer county case. No copy of the pleadings in the last-named case were pleaded or proved in this case, and it is impossible for us to say what the real issues were in the Greer county case, although it seems to be admitted that the charge on the part of the plaintiff was abandonment, and on the part of Mrs. Brady was cruel and inhuman treatment and habitual intoxication. Yet we know that under the general head of cruel and inhuman treatment the pleader could set out in the Beckham county case issues and facts wholly different and occurring subsequently to those tried in the Greer county case, although they might properly be classed under the same general name. Before this plea, *i. e.*, *res adjudicata*, as urged here can be sustained in this particular, it should affirmatively appear of record that the issues and facts upon which the former judgment was rendered are the same issues and facts and were properly submitted to and considered by the court by the pleadings in the latter action, and were the same issues and facts upon which the latter judgment was based. This record is silent on the subject, and the presumption follows that the issues were other and different from those of the former action. Yet, whether those facts were the same or not, and

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whether the issues were the same and were within the pleadings in both cases, it is a matter of no consequence, so far as this case is concerned, and it is unnecessary to decide that question, and we, therefore, decline to do so, because Ellen Brady, up to the time of the Beckham county divorce case, was the legal wife of J. H. Brady, and as such had a homestead interest in the land in controversy (provided, of course, the title to the same was in Brady, but of which see *post*) and the deed from Brady to McWhorter prior to their divorce would not be valid without her signature. This fact cannot be gainsaid. No argument is required to establish the correctness of this proposition.

Finally it is urged by plaintiff in error that the decree of the district court of Greer county canceled the deed from J. H. Brady to his wife, and also perpetually enjoined her from interfering in any way with his right of possession. It will be remembered that prior to the Greer county divorce case the parties had separated and that Brady deeded one 80 acres of the farm to his wife, and she in turn deeded the other 80 acres to him; after the decree of divorce had been denied both parties by the Greer county district court, Brady brought suit to cancel the deed he had made to his wife, on the grounds of no consideration, etc.; the court granted the prayer of his petition and a default judgment was entered against the wife, but the court, instead of vesting the title in Brady, vested it in him as *trustee for the use and benefit of the minor children of the couple*. From this decree no appeal was ever taken, and the same, so far as this case is concerned, became final. This being true, Ellen Brady occupied the position of wife to J. H. Brady and the restraining order preventing her from interfering with her husband's possession did not alter her relation in that respect, nor divest her of the homestead title to the land that she, by virtue of such relation, possessed. Even though the Greer county decree should be construed to vest the entire legal title of the land in J. H. Brady, still she, as his legal wife, would yet possess a homestead interest in and to the land in question, it being the only land possessed by them or either of them. On the other hand, it is contended by plaintiff in error that while the

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Greer county decree vested the entire title of the land in J. H. Brady, the husband, and that such part of said decree is valid, yet that part which vests the title in him as trustee for the use and benefit of his minor children is void. This is indeed an inconsistent contention. If the decree is void as to the children, we cannot see why it is not void as to Brady. The decree cannot be attacked by McWhorter in this action in this manner; nor need we decide whether it might not, in a proper case, by the proper parties, be modified, altered, or annulled. So long as Brady and his wife were satisfied with it and did not appeal therefrom or question it in any manner, surely McWhorter, Brady's grantee, cannot in this proceeding do so.

As we view it, McWhorter has no title, or color of title in and to this land. In order to fully understand his position, it becomes necessary to examine the decree of the Greer county district court upon which he bases his title. It reads as follows:

"JOURNAL ENTRY.

"This cause coming on to be heard this 16th day of August, as a regular court day within the August term of said court, and the defendant, though having been personally served more than forty days prior to the date set for hearing as shown by the sheriff's return, and having been called in open court to answer, plead, or demur, and not appearing, either in person or by attorney, and the plaintiff appearing in person and by attorney, and having introduced testimony, and the court having heard all the evidence and being fully advised in the premises, finds that the deed to the S. E. $\frac{1}{4}$ of section 10, township 8, north of range 26, west 1. M., made, executed and delivered by said plaintiff to said defendant was without consideration and void.

"Wherefore, it is hereby ordered, adjudged, and decreed that the said deed be set aside, and that the title to said land be, and the same is hereby vested in J. H. Brady, as trustee for and in behalf of the minor children of said marriage (italics ours) and that the said defendant be perpetually restrained from interfering with the possession of the said plaintiff in and to said land.

"C. F. IRWIN, Judge.

"Filed Nov. 6, 1907, E. M. HEGLER, Clerk.

"By J. W. SPROAT, Deputy."

It is thus seen that Brady had no title in himself, but held the land simply as trustee for his minor children.

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Aside from the question of *lis pendens* and the failure of Brady to give McWhorter a deed in which he was joined by his wife, it being found that her abandonment was involuntary and occasioned by the wrongful conduct of Brady, either of which questions would render the transfer void, it is evident that Brady had no interest in the land which he could convey, the title being in his minor children.

We fail to detect any error in the judgment of the trial court, and the same should, therefore, be affirmed.

By the Court: It is so ordered.

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No. 3036. Opinion Filed December 23, 1913.

Rehearing Denied February 3, 1914.

(138 Pac. 392.)

1. **BANKS AND BANKING—Contract by Cashier—Liability of Bank—Estoppel.** Where a cashier of a bank makes a contract which is beyond his power and authority, but the bank by reason thereof secures a benefit or beneficial effect, it will not thereafter be heard to urge nonliability thereunder on the plea of *ultra vires*.
2. **CORPORATIONS—Ultra Vires Contract—Estoppel.** It may be considered as settled law in this state to-day that, when a corporation goes outside of its legitimate business and makes a contract, and that contract is executed, and the corporation has received the benefits of the contract, the courts will not listen to a plea of *ultra vires*.
3. **SAME—Action.** When suit is brought on an *ultra vires* contract against a corporation, the contract being evidenced by a written instrument, the action is not maintained by virtue of the written instrument, but on the implied contract of the corporation to return the property delivered by virtue thereof or to place the parties in *status quo*. To maintain such an action is not to affirm, but to disaffirm, the original or unlawful contract.
4. **CORPORATIONS—Powers—Contracts—“Ultra Vires.”** There are many shades and distinctions of meaning of the term “*ultra*

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vires," but in its primary sense it means beyond the scope and power of a corporation to perform under any circumstances or for any purpose.

(Syllabus by Robertson, C.)

Error from County Court, Pittsburg County;
B. P. Hammond, Judge.

Action by the Aetna Powder Company against the Crowder State Bank and another to recover money judgment. Judgment for plaintiff against the bank only, and the bank brings error. Affirmed.

Robert N. McMillen, for plaintiff in error.

Wright & Boyd, for defendant in error, Aetna Powder Co.

Opinion by ROBERTSON, C. In the year 1907 W. A. Lovejoy, then engaged as a contractor by the M., K. & T. Ry. Co., in Pittsburg county, Okla., being in need of powder and dynamite with which to prosecute his work, ordered a large quantity thereof from the Aetna Powder Company; the order was in writing, and at the bottom of the paper, and under the signature of Lovejoy, was the following:

"We agree to hold the amount of this bill out of funds due Mr. Lovejoy when same is received by us.

"THE CROWDER STATE BANK,

"By J. L. HENDERSON, Cashier.

"Aug. 2, '07."

And on the reverse side of the order appears the words: "J. J. Burba, above guarantees account ——— of Crowder, I. T."

By virtue of said order and the indorsements thereon, as aforesaid, the Aetna Powder Company, on August 10, 1907, shipped Lovejoy powder and dynamite to the value of \$189, and the same was received and used by him. On February 1, 1908, Lovejoy's employer, the M., K. & T. Ry. Co., issued its check to him for the sum of \$3,275.87, and on March 2d thereafter another check for \$1,243.02, in part payment of the work performed by him under his contract; both these checks were issued to Lovejoy subsequent to the order and shipment of the powder and dynamite, and were indorsed and deposited by him

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with the plaintiff in error, the Crowder State Bank, and by it collected in the usual course of business. Notwithstanding said sum of \$4,518.90 belonging to the defendant Lovejoy came into the possession of defendant bank subsequent to the giving of the order for the powder and dynamite, as aforesaid, with the indorsements of said bank, the said bank failed and refused to withhold the amount of the bill due the Aetna Powder Company, and failed and refused absolutely to apply \$189 of said amount on the payment of said bill, which by its indorsement it was bound to do. Suit was instituted by the Aetna Powder Company against Lovejoy, the Crowder State Bank, and Burba for the recovery of the amount. No service was had on Lovejoy, and the suit proceeded against his codefendants and resulted in a judgment against the bank for the full amount. Burba recovered a judgment for his costs, the jury finding for him on the merits of the case. The bank brings this appeal and insists that there is error in the record in that: (1) Plaintiff's petition fails to state facts sufficient to constitute a cause of action. (2) The evidence fails to show a cause of action in favor of plaintiff and against defendant. (3) The evidence fails to show that plaintiff suffered any substantial damage by the failure of defendant bank to withhold the money from Lovejoy's account. (4) The court erred in giving instruction No. 3 to the jury. (5) The court erred in rendering judgment against defendant. (6) The court erred in overruling defendant bank's motion for new trial.

While the petition in error contains six separate assignments of error, it is evident that the principal question in the case is: The allegations of the petition and the proof show that the undertaking assumed by the bank was *ultra vires* and therefore not binding upon it.

The evidence clearly shows that Lovejoy, the contractor, was a customer of the bank; at times he had large deposits, while at other times he was overdrawn; at the time the powder and dynamite were ordered, August 2, 1907, it is not shown what the condition of his account was; on December 6, 1907, Mr. Hawley, manager of the Aetna Powder Company at St. Louis, wrote to the bank as follows:

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"St. Louis, Mo., Dec. 6, 1907.

"Crowder State Bank, Crowder, Okla. — Gentlemen: We hand you herewith statement of account against Mr. W. A. Lovejoy, Crowder, Oklahoma, amount of same \$189.00, which is long past due, the account being dated August 10th. When this order was given by Mr. Lovejoy you made a notation on the order saying that you would hold the amount of this bill out of funds due Mr. Lovejoy when same was received by you. As we have not heard from Mr. Lovejoy for some time and are quite eager to close our books for the year, will you kindly send us a check for the amount if you have the funds on hand. Very truly,

"THE AETNA POWDER COMPANY,

"B.

E. W. HAWLEY."

"Mr. Lovejoy is expecting his money every day now, and when paid will be attended to."

"Received Dec. 14, 1907. Chicago."

The notation on the letter under Hawley's signature was made by Henderson, the cashier of defendant bank, and after making it he returned the letter to the powder company.

On January 28, 1908, Mr. Rodgers, the auditor of the powder company, wrote the bank the following letter:

"Chicago, January 28, 1908.

"Crowder State Bank, Crowder, Oklahoma.—Dear Sirs: On December 6th, we received a notation on the bottom of our letter of that date regarding our account against W. A. Lovejoy of your city, stating that payment would be forwarded to us in a few days as Mr. Lovejoy was expecting his money. This is now almost sixty days ago and as the account is quite old we would thank you to advise us when we may expect payment.

"Very truly yours,

"THE AETNA POWDER COMPANY,

"By J. H. RODGERS, Auditor."

This letter was received by the bank, and Mr. Henderson, the cashier, returned the same to the powder company at Chicago on February 2, 1908, with the following indorsement on the back (Record, p. 47):

"It is my understanding that Mr. Lovejoy will remit you just as soon as the Katy pays him his November estimates. The Katy is about sixty days behind. Expect settlement next week."

Mr. Hoyt, the salesman for the powder company, testified that he sold Lovejoy the powder and dynamite in August, 1907;

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that Lovejoy signed the order in his presence; that Henderson, the cashier, signed the indorsement in his presence also. This is not denied.

Henderson, the cashier, testified that he indorsed the order as charged by the powder company; that he had made the notations on the letters above set out; that he did not call the attention of the board of directors to the fact that the powder company held the bank liable for the account; that he did not remember the circumstances transpiring at the time the order was signed, except that Mr. Lovejoy wanted some powder and that the powder company wanted the bank to pay them for it when the money came to Mr. Lovejoy; that the bank had an assignment of all of Lovejoy's money due him on his estimates and that he told the powder company that when the money came to the bank, if there was anything left after paying the bank, the powder company would be paid; that Lovejoy was then depositing his money in the bank, and that at the time he was in Crowder doing some construction work for the Katy Railway; that because Lovejoy wanted him to indorse the order he would do so to encourage him as much as he could; that he knew Lovejoy had the money coming to him; that the bank did what it could to suit Lovejoy's convenience; that the bank permitted Lovejoy to check out the balance of \$1,421.64, which was to his credit on February 5, 1908; that the bank had its other indebtedness secured by assignment; that the bank knew the order had not been paid, but did not consider it had guaranteed the same. From his testimony it is further shown that Lovejoy on December 6, 1907, had a credit in the bank of \$90.34; that on January 28, 1908, he had overdrawn \$1,662.82; that on May 18, 1908, he closed his account with the bank; that the last time there was a credit balance to him was April 8, 1908, to the amount of \$41.48; that on the day the order was made his balance was \$171.14; that on February 5, 1908, he deposited \$3,275.87; that at the time he made this last deposit he owed the bank \$1,774.14, and that after making the deposit he had a credit balance of \$1,425.64; that on the 4th day of April, 1908, his balance was \$837.38.

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The action in the court below proceeded apparently on the theory that the cause of action was predicated upon a written instrument and not for damage by reason of the breach of contract. Of this phase of the case we will deal later, but now, without enunciating any general rule, it will be sufficient for us to determine whether or not the facts, as stated, bring this case within the doctrine of *ultra vires* as relied upon by the bank. The plea of *ultra vires* as used herein is intended doubtless to mean that act of the cashier in guaranteeing payment of the account to the powder company without the knowledge, consent, or ratification of the board of directors. It is not used in its primary sense or meaning, as being beyond the scope of the powers of the corporation to perform it under any circumstances or for any purpose. There are many shades of meaning and distinction employed and understood by the term, but, as we use it here, it is meant thereby to challenge the authority of the cashier of defendant bank to bind the same as a guarantor without the knowledge or consent or ratification of the board of directors. Used in this sense, it becomes a matter of primary importance to ascertain at first whether or not the bank secured a benefit or a beneficial effect of the alleged contract. Ordinarily, where the bank or corporation secures a benefit or a beneficial effect from the contract, or when the contract is not plainly beyond the scope or power of the parties making it, the above principle cannot be invoked or relied upon. It is only in cases of ambiguity or vagueness or where the contract is doubtful in this respect that it can be applied. But if the contract complained of is one which clearly contemplates some act beneficial to the corporation, it will generally be upheld and the plea disregarded. 3 Thompson, Corporations, sec. 2116.

“Where the contract is auxiliary and beneficial to the main business for which a corporation is formed, although not within the exact scope of its powers, contracts will be upheld and the defense of *ultra vires* will not be permitted.” (*Malone v. Lancaster*, 182 Pa. 309, 37 Atl. 932.)

In the case at bar it is clearly inferable from the record that the bank was interested in having Lovejoy perform his contract

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with the railway company. It had his assignment of estimates and collected the amounts due him and permitted him to make overdrafts at certain times. Without powder and dynamite Lovejoy could not perform his contract with the railway, and, for the purpose of enabling him to do so, it became necessary that he have credit upon which to purchase the necessary instrumentalities with which he could successfully prosecute his work. For this purpose, and this alone, the bank, through its cashier, lent him aid, by indorsing as guarantor the written order for the powder. By the use of the powder he was enabled to perform his contract, and by performing his contract he was able to close his account at the bank without a loss to it. Banks are often permitted to go into other business in order to save a debt. Many courts hold that public policy requires that a bank should have broad powers in the exercise of the judgment of the officials in order to protect itself from losses, and again, that, although a corporation may exceed its powers by entering into contracts not permitted by its charter, nevertheless, if those contracts are not *malum in se*, the corporation itself cannot avoid them by pleading *ultra vires*. And it seems to us that, whether a contract is *ultra vires* or not, if the corporation has permitted its execution and allowed innocent parties to surrender property or other things of value thereunder without objection, and it is impossible to restore their *status quo* and at the same time itself receive and keep the benefits or beneficial effects, it will not then be heard to plead *ultra vires* or lack of authority of one of its principal officers to bind it in that particular respect.

"* * * It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract, in good faith, has been fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract." (*Darst v. Gale*, 83 Ill. 141.)

"Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not * * * prevail where it would defeat the ends of justice or work a legal wrong." (*Ohio, etc., Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693.)

"The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be ap-

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plied where it will defeat the ends of justice, if such a result can be avoided." (*San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 817.)

"The plea of *ultra vires* will not be allowed to prevail, * * * when it will not advance justice, but, on the contrary, will accomplish a legal wrong." (*Lewis v. American S. & L. Association*, 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.)

"A corporation cannot defend against a contract liability growing out of a business in which it is actually engaged on the ground that such business was done in excess of its corporate powers." (*Linkauf v. Lombard*, 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. Rep. 743.)

"In case of a transaction which is simply *ultra vires*, neither party will be heard to allege its invalidity while retaining its fruits. Limitation of the contractual power of a corporation does not prevent it from making restitution of money or property obtained under an unauthorized contract." (*Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582.)

"It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which it retains." (Sedgwick on Statutes and Statutory Construction, p. 73.)

"And this is especially true where the contract has been executed and third parties have acquired rights on the faith of it." (29 Cyc. 52.)

"It may be considered as settled law today when a corporation goes outside of its legitimate business and makes a contract, and that contract is executed, and the corporation has received the benefits of the contract, the courts will never listen to a plea of *ultra vires*." (29 Cyc. 52; *Holt v. Winfield Bank* [C. C.] 25 Fed. 812.)

"In cases of contracts upon which corporations could not be sued because they were *ultra vires*, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice, by the recovery of the property or the money specifically, or as money had and received to plaintiff's use." (*Salt Lake City v. Hollister*, 118 U. S. 263, 6 Sup. Ct. 1055, 30 L. Ed. 176.)

"The executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require." (*Parish v. Wheeler*, 22 N. Y. 509.)

"Where a corporation enters into a contract *ultra vires* and the other party, in reliance thereon and in execution thereof,

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expends money, the corporation is liable on the contract, provided it be not in violation of its charter nor prohibited by law." (*State Board v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702.)

"At the present time, the defense of *ultra vires* is very generally regarded by the courts as an ungracious and odious one. And it is very well settled that neither party to the contract can avail itself of such a defense when the contract has been fully performed by the other party, and he has received the full benefit of the performance of the contract. If an action cannot be brought directly on the contract, equity will grant relief, or an action in some other form will prevail." (29 Cyc. 46.)

"The modern rule has been well stated thus: If the act is one which is lawful in itself and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends in a substantial, and not in a remote and fanciful, sense, it may fairly be considered within the charter powers." (29 Cyc. 47.)

"To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing; to say that it may retain the proceeds thereof which may have come into its possession, without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud." (Green's Brice's "Ultra Vires" [2d Amer. Ed.] 721.)

It may be urged that the instrument sued on was not a written contract, inasmuch as its execution was *ultra vires*. It is unnecessary to give consideration to this suggestion, further than to say that, even though the claim might not be upheld on the written contract because unlawful, nor according to its terms, yet it will be sustained upon the implied contract of the bank to return the property delivered by virtue thereof or to place the parties in *status quo*. This, it is conceded, cannot be done, because the powder has been used in the prosecution of that work which enabled the bank to protect itself as to Lovejoy, and which was the beneficial effect of the contract flowing to and accepted by the bank.

Thus it was said in *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, by Mr. Justice Gray:

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"A contract *ultra vires* being unlawful and void, not because of its being in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between parties, so far as could be done consistently with adherence to law by permitting the property or money, parted with on faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

Inasmuch as the contract under consideration has, long prior to the commencement of this action, been fully executed and was of beneficial force and effect to the bank, and the bank, notwithstanding these facts, failed and refused to protect the powder company when it had the opportunity, it will not now be heard to urge the plea of *ultra vires* as relied upon in the court below.

The other questions presented by the record, in view of the foregoing conclusion, become immaterial, and no further consideration need be given them.

The judgment should be affirmed.

By the Court: It is so ordered.

WESTERN UNION TELEGRAPH CO. v. DOBYNS.

No. 3124. Opinion Filed February 3, 1914.

(138 Pac. 570.)

1. **TELEGRAPHS AND TELEPHONES—Transmission of Message—Contract—What Laws Governs.** In an action for damages against a telegraph company for failure to properly transmit a message, where the entire contract was made and fully executed in the Indian Territory prior to statehood, the law in force in said territory at the time the contract was made must govern.

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2. **SAME.** Such a contract being an Indian Territory contract, the common law and the statutes extended in force in said territory by the United States are applicable thereto, and the decisions of the federal courts are binding on this court in such an action.
3. **SAME—Telegraph Companies.** At that time telegraph companies in the Indian Territory were not common carriers.
4. **SAME—Contract Limitation of Liability—Validity.** At that time and place telegraph companies had the right to contract concerning the transmission of messages and might contract to send them either at sender's risk at a certain rate, or at the company's risk, if the message was to be repeated, at a rate to be increased by one-half, or they might insure the correctness of transmission for an additional sum to be agreed upon.
5. **SAME.** At that time and place a telegraph company could provide for its exemption from liability for error in unrepeatd messages, in the absence of willful misconduct or gross negligence.
6. **APPEAL AND ERROR—Time for Appeal—Overruling of Demurrer.** This court will review an order overruling a demurrer, although the statutory time for taking an appeal therefrom has expired, provided the proceeding in error to review the final judgment in the action has been commenced within the statutory period.
7. **SAME—Sustaining of Demurrer.** Where a demurrer has been sustained, in order to review the order sustaining same, the appeal must be had from such order within the statutory time for taking an appeal.

(Syllabus by Robertson, C.)

Error from County Court, Garvin County;
W. B. M. Mitchell, Judge.

Action by T. J. Dobyns against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Geo. H. Fearons and Albert Rennie, for plaintiff in error.

J. B. Thompson, for defendant in error.

Opinion by ROBERTSON, C. This action was commenced in the county court of Garvin county on January 9, 1909, by T. J. Dobyns, hereinafter referred to as plaintiff, against the Western Union Telegraph Company, hereinafter referred to as the telegraph company, to recover damages on account of negligence of the telegraph company in the transmission of a telegram. In the petition it was alleged: That on May 31, 1907, the plain-

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tiff delivered to the defendant, at Maysville, Ind. T., for transmission to P. E. Schow & Bros., at Clifton, Tex., a message reading as follows:

"Maysville, I. T. 5—31. To P. E. Schow & Bros.: Offer immediate shipment car No. three bulk white f. o. b. Maysville. Fifty-six. T. J. Dobyns."

That in transmitting said message the word "white," meaning corn, was changed to "wheat." That on said day P. E. Schow & Bros. accepted said offer by telegraph to the plaintiff in the following words:

"Clifton, Texas, 5—31. T. J. Dobyns, Maysville, I. T.: Offer accepted No. three bulk white fifty-six cents, provided you load capacity car and sweet. P. E. Schow & Bros."

That plaintiff loaded and shipped a car of corn in accordance with the terms of the telegram and attached the bill of lading to the draft for the price. The consignee refused the corn, the draft was protested, and plaintiff was compelled to ship the corn to McGregor, Tex., to get a market for it. That he was put to the expense of telephone calls, protest fees, time and expense of himself to Clifton and McGregor, and also that 23 bushels and 10 pounds of corn was stolen, all of which, together with the difference in the amount received for the corn and the 56 cents, amounted to \$205.96, for which he sought judgment.

Defendant on August 23, 1910, filed its demurrer to that portion of plaintiff's first amended petition alleging shortage in the corn, and further that said petition nowhere states that plaintiff paid or contracted to pay defendant anything for its services rendered in sending said message. The demurrer was by the court overruled. Thereafter defendant answered, denying each and every material allegation the said petition contained, not specifically admitted, and alleged, in addition, that the message received for transmission was obscure to the employees of defendant, and said message was therefore of doubtful meaning, and that plaintiff in delivering said message did so under an agreement indorsed on the back of the same which contained, among other terms, the following:

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender

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of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that the said company shall not be liable for mistakes or delays in the transmission or delivery, or nondelivery of any unrepeated message, beyond the amount received for sending same; or for errors in cipher or obscure messages."

It further answered and denied liability, for that the plaintiff never paid, nor agreed to pay, the defendant anything for its services in the transmission of said message; that the said message was an unrepeated message, and, according to the contract entered into, the telegraph company was in no wise responsible by reason of the error in transmission except to the amount paid for its transmission. The defendant further alleges that plaintiff was offered 67 cents per bushel for the corn on arrival of said car at Clifton if it graded No. 3 dry and sound, but that said corn did not come up to the specifications, nor to the specifications mentioned in the message above set out, but notwithstanding, plaintiff was offered 62½ cents per bushel for the corn on June 18, 1907; that had said corn been up to the grade stated in said message, at the price offered, plaintiff would have realized within \$30.10 of the price stated in said message; that on the day plaintiff began loading said corn it came to his knowledge that P. E. Schow & Bros. thought they were buying wheat instead of corn, and that plaintiff took the chances of said corn being accepted and shipped same without receiving the confirmation, and that therefore the loss is directly liable to plaintiff's own negligence and not to that of the telegraph company.

On August 23, 1910, plaintiff filed a demurrer to that part of defendant's answer setting up as a defense to this action the terms of the contract as to unrepeated and obscure messages and to that part alleging absence of contract to pay anything for the services of transmission, which demurrer was sustained by the court, and on the same day the plaintiff filed his reply, consisting of a general denial. The cause went to trial and resulted in a verdict of \$180 against the defendant. Motion for

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new trial was filed, overruled, and defendant brings this appeal to reverse the judgment entered therein.

The telegram having been delivered to the telegraph company, for transmission, in the Indian Territory prior to statehood, and the whole transaction having been completed in said territory prior to statehood, it follows that the contract thus made by the parties was an Indian Territory contract, governed by the laws in force in that jurisdiction at the time. *Turner v. Grail*, 24 Okla. 135, 103 Pac. 575; *W. U. Tel. Co. v. Pratt*, 18 Okla. 274, 89 Pac. 237; *Barnes v. American Soda Fountain*, 32 Okla. 81, 121 Pac. 250.

The foregoing fact should be borne in mind in order to prevent confusion with the later cases, as it has been held in *Levy Bros. v. W. U. Tel. Co.*, 39 Okla. 416, 135 Pac. 423, that, when a telegraph company fails to properly and correctly transmit a message, an action for damages resulting therefrom is one sounding in tort and not for breach of contract.

Therefore, in order to determine what the law is governing this cause of action, it becomes our duty to investigate the common law as it existed in the Indian Territory at the time, as well as the acts of Congress then in force, both to be construed and applied as construed and applied by the federal courts, and in this connection it is well to observe, as has been suggested by counsel for plaintiff in error, that chapter 145 of Mansfield's Digest of the Laws of Arkansas was not extended over and put in force in the Indian Territory by Congress, notwithstanding the assumption to that effect by the Supreme Court of the territory of Oklahoma in *W. U. Tel. Co. v. Pratt*, 18 Okla. 274, 89 Pac. 237.

The federal courts, prior to the time this cause of action arose, had decided the questions in this case adversely to the contention of defendant in error. Thus it had been held in *Southern Express Co. v. Caldwell*, 21 Wall. (88 U. S.) 264, 22 L. Ed. 556, *W. U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067, and *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, that telegraph companies are not common carriers and are not subject to the same liability; while it has been

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held in *Primrose v. W. U. Tel. Co.*, *supra*, *Halstead v. Postal Tel. Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952, and *Pearsall v. W. U. Tel. Co.*, 124 N. Y. 270, 26 N. E. 537, 21 Am. St. Rep. 662, that telegraph companies have the right to contract concerning the transmission of messages, and that they may send them either at the sender's risk at a certain rate, or at the company's risk if the message is repeated at a rate increased by one-half, or they may insure the correctness of the transmission for an additional sum to be agreed upon; and it has also been held in *Primrose v. W. U. Tel. Co.*, *supra*, *Halstead v. Postal Tel. Co.*, *supra*, and in *W. U. Tel. Co. v. Coggin*, 68 Fed. 138, 15 C. C. A. 231, *Box v. Postal Tel. Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Wheelock v. Postal Tel. Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188, and *W. U. Tel. Co. v. Pratt*, *supra*, that the provision exempting the telegraph companies for liability for error in unrepeatable messages is binding and valid in the absence of willful misconduct and gross negligence. Hence it necessarily follows that the lower court erred in sustaining defendant in error's demurrer to the answer, which set up the terms of the contract as to unrepeatable messages, and that the demurrer to that part of the defendant's answer setting up the terms of the contract as to repeatable messages should have been overruled, and that the court erred in refusing to permit the introduction in evidence of the contract on the back of the original message, and also erred in refusing to permit the telegraph company's counsel to read the same to the jury.

Counsel for plaintiff contend that we are without jurisdiction to examine the foregoing assignments of error as raised by the telegraph company, for that, the points involved having been raised by it in the trial court by demurrer and the demurrer having been overruled, the appeal should have been prosecuted from the order of the trial court in overruling the demurrer and brought to this court within one year from the day the same was overruled, which was not done; but this is not the correct rule. Had the demurrer been sustained, instead of being overruled, the foregoing rule would have obtained, for, when a court

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sustains a demurrer, the effect of such ruling is to eliminate from the case all further consideration of the point involved, but, when the demurrer is overruled, the fault of the pleading, or the objectionable matter, sought to be eliminated, is retained in the case and affects its whole subsequent history, and the error committed by the court can be examined when the whole case is considered on appeal, provided the appeal in the case proper is seasonable (*Wails et al. v. Farrington*, 27 Okla. 754, 116 Pac. 428, 35 L. R. A. [N. S.] 1174; *Love, Sheriff, et al. v. Cavett*, 26 Okla. 179, 109 Pac. 553; *Mechanics', etc., Bank v. Harding*, 65 Kan. 655, 70 Pac. 655; *Connor, Sheriff, etc., v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71), whereas, if the matter attacked by the demurrer is eliminated from the case by sustaining the demurrer, the error must be cured by appeal direct from the order sustaining said demurrer and within the statutory time allowed for appeal.

From a consideration of the foregoing, it follows that the judgment should be reversed, and the cause remanded for a new trial.

By the Court: It is so ordered.

PROCHNAU v. MARTEN.

No. 1842. Opinion Filed February 10, 1914.

(138 Pac. 807.)

1. **SUFFICIENCY OF PETITION.** Petition examined, and held to clearly state a cause of action.
2. **APPEAL AND ERROR—Presentation for Review—Transcript.** Errors alleged to have occurred during the trial cannot be brought here for review on a transcript. They must be preserved and presented here by bill of exceptions or case-made.

(Syllabus by Brewer, C.)

Error from District Court, Major County;

Action by B. B. Marten against Dan Prochnau. Judgment for plaintiff, and defendant brings error. Affirmed.

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H. M. Bear, for plaintiff in error.

E. W. Snoddy, for defendant in error.

Opinion by BREWER, C. This cause was dismissed by this court in a former opinion, for the reason that the final judgment had not been brought into the record. Since then the parties by agreement have been permitted to amend by bringing the judgment into the record, which is here certified as a transcript. The errors assigned are: First, that the petition filed in this case does not state a cause of action. Second, error in overruling the motion for new trial.

The second error alleged cannot be considered on transcript. None of the evidence is before the court. To have considered matters occurring at the trial the proceedings thereof must be preserved and presented here for review on bill of exceptions or case-made. *Simpson v. Henderson-Sturges Piano Co.*, 31 Okla. 623, 122 Pac. 174; *St. L. & S. F. R. Co. v. McCollum & Baker*, 23 Okla. 899, 101 Pac. 1120.

The first ground alleged as error is not sound. We have examined the petition carefully, and think it very clearly and unquestionably states a cause of action. A very close study of appellant's contentions in the brief and the one authority he cites fails to shake this conclusion. To set the petition out and discuss it would serve no good purpose, as no new or interesting question is presented.

The cause should be affirmed.

By the Court: It is so ordered.

CHICAGO, R. I. & P. RY. CO. v. EVANS.

No. 3245. Opinion Filed February 10, 1914.

(138 Pac. 804.)

1. **CARRIERS—Ejection of Trespasser—Liability for Injuries.** A person who enters a passenger train at a station, without ticket or money to pay fare, for the purpose of collecting an account from a passenger on such train, and remains on the train after it leaves such station, is not a passenger, and the company, through its servants and employees, may eject him from the train at a proper place for failure to produce a ticket, or to pay fare, or on account of boisterous conduct, and the company is not liable for injury resulting to such passenger when only such force is used as is reasonably necessary to eject him under the circumstances.
2. **SAME—Liability for Wanton Injuries.** A railway company is liable for injury willfully and wantonly inflicted upon a trespasser or licensee on one of its passenger trains.
3. **SAME.** If, in ejecting a trespasser or licensee from one of its passenger trains, the servants and employees of the company use more force than is reasonably necessary, or if after he is ejected they wantonly and willfully injure him, the company is liable for such injury.

(Syllabus by Galbraith, C.)

*Error from District Court, Seminole County;**Tom D. McKeown, Judge.*

Action by Charley Evans, an infant, by C. T. Evans, his father and next friend, against the Chicago, Rock Island & Pacific Railway company. Judgment was for the plaintiff, and the defendant brings error. Affirmed.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, for plaintiff in error.

G. C. Crump, A. M. Fowler, and J. L. Skinner, for defendant in error.

Opinion by GALBRAITH, C. This was an action instituted by Charley Evans, a minor, by his father and next friend, for damages for personal injuries on account of an alleged forc-

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ble and wrongful ejection from one of the defendant's passenger trains between Holdenville and Wewoka, Okla. Issue was properly joined, and there was a trial to the court and jury and a verdict and judgment for the plaintiff against the defendant for \$1,945, from which an appeal was properly perfected to this court by petition in error and case-made.

Error is assigned in overruling the motion for new trial and in rendering judgment for the plaintiff. It is urged by the plaintiff in error that the trial court erred in its instructions to the jury and in refusing to give a requested instruction, and that the judgment is excessive.

It appears from the evidence that the plaintiff, who was a young man, nineteen years of age, boarded one of the plaintiff's passenger trains at Holdenville for the purpose of collecting a debt from one Mike Ryan, a passenger on said train, and that after he boarded the train he engaged in a controversy with Mike Ryan, and the train pulled out of Holdenville and continued on its journey toward Shawnee, and, when some three or four miles from Holdenville, the plaintiff, still engaged in his controversy with Mike Ryan, became boisterous and was creating a disturbance with the passengers on the train, and, the conductor's attention being then called to the disturbance, he went back to the part of the train where the plaintiff and Ryan were and attempted to quiet the plaintiff. The auditor then asked plaintiff for his ticket. The plaintiff said he had no ticket, "wasn't going anywhere," and had no money to pay his fare, and the conductor, then failing to quiet him, gave the signal and stopped the train, and called the brakeman and a railway detective, by the name of Burnett, to assist him, and proceeded to eject plaintiff from the train. The plaintiff put up a vigorous fight, but was finally ejected, and when he was jerked from the steps of the car to the ground he was then at the top of an embankment or fill, variously estimated by the witnesses from ten to twenty feet deep. A witness for the plaintiff testified that Burnett then grabbed the feet of the plaintiff and whirled him down the embankment. The brakeman testified for the defendant that Burnett pushed the plaintiff and that caused him to roll down the

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embankment. At any rate, he rolled down to the bottom of the fill. The train was then started, and a physician who was aboard the train suggested to the conductor that for the protection of the company and plaintiff he ought not to be left in that place, and suggested that the train be backed up and he be placed in the baggage car and taken to the next station, which was Wewoka, and turned over to the authorities. The train was then stopped and backed up, and the plaintiff was helped up, or got up, and without assistance walked and got into the baggage car, and rode there until the train arrived at Wewoka, where he was turned over to the county physician. All this occurred on May 25, 1909. The evidence shows that on August 2d following the plaintiff was adjudged insane by the insanity board of Pittsburg county, where his father resided and where he was taken after this incident and sent to the insane asylum at Norman, where he was still confined at the date of the trial, February 1, 1911. It was contended on behalf of the plaintiff that the force and violence used in ejecting him from the train and after he was ejected was the proximate cause of his subsequent insanity.

It is clear from the testimony that the plaintiff was not a passenger on the defendant's train, and that he did not intend to become a passenger when he entered the train. He neither purchased a ticket before entering nor provided himself with money to pay his fare from the station where he entered to the next station. The railway company, therefore, did not owe him that high degree of care it owes a passenger on one of its trains. Its servants had a right to eject him in a proper manner and at a proper place for failure to pay his fare, or to produce a ticket, and on account of the boisterous conduct and annoyance he caused to the passengers on the train. Section 813, Rev. Laws 1910.

In instruction No. 2, complained of by the plaintiff in error, the court told the jury that the servants of the defendant had a right to eject the plaintiff from the train or to remove him from the passenger car to some other part of the train, but in so doing they were bound to use only such force as was reasonably necessary under the circumstances to remove and eject him.

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In the third instruction of the court to the jury, also complained of by the plaintiff in error, the court told the jury, in effect, that the plaintiff was not a passenger on the train, and he could not recover for such ejection without unnecessary force.

It is said by Sharp, C., in *C., R. I. & P. Ry. Co. v. Stone*, 34 Okla. 368, 125 Pac. 1122:

"Railway companies are bound to exercise their dangerous business with due care to avoid injury to others; and when they fail to do so they are liable for damages even to a trespasser, who has not been guilty of contributory negligence. White, Personal Injuries in Railroad, etc., sec. 1075. A reckless disregard of consequences may be so great as to imply a willingness to inflict an injury, such as to entitle a trespasser to recover, although there is no actual intent to harm him. *Id.* sec. 1078. On the contrary, it is the general rule that the railroad company is not liable to a trespasser on its property, in the absence of any wantonness and willfulness or gross negligence. Under settled rules of public policy, railway companies are not to be made liable for injuries received by trespassers upon their trains, unless the injury is inflicted under circumstances indicating wantonness or willfulness in the servants of the companies. The rule seems to be almost universally recognized and approved, and is in consonance with reason and right." (See cases cited.)

It does not seem to be material in this case whether the plaintiff was a trespasser or a licensee; so long as he was not a passenger, the company's duty to him would not be any different, since it would be liable for injury wantonly and willfully inflicted upon either trespasser or licensee.

The instruction requested by the plaintiff in error and refused by the court was as follows:

"If you feel and believe from the evidence in this case that the plaintiff was a trespasser upon the passenger train of the defendant, then the defendant, through its employees and servants, was only bound to the duty of not willfully and intentionally injuring the plaintiff."

While this instruction requested by the plaintiff in error was possibly a correct statement of the rule of law as to the duty a carrier owes a trespasser on one of its trains, still, if the court in its instructions covered this duty in different language and in different form, it was not prejudicial error to deny the re-

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quested instruction. *Finch v. Brown*, 27 Okla. 217, 111 Pac. 391, and cases cited.

The court told the jury in instruction No. 3 that the plaintiff was not a passenger on defendant's train, and that the defendant's servants had a right to eject him without unnecessary force, and that he was not entitled to recover for such ejection; and in instruction No. 2 told the jury that the servants of the plaintiff in error had a right to remove the plaintiff from the train or from the passenger car to some other part of the train, but that in so doing they were bound to use only such force as was reasonably necessary under the circumstances. The jury doubtless understood from these instructions that the company was not authorized to use wanton or willful violence toward the defendant, even though he were a trespasser, and that the company was only liable for injury resulting from wanton and willful violence used in ejecting the plaintiff from the train.

The instructions of the court to the jury seem to reasonably cover the law of the case and the respective rights and duties of the parties under the circumstances, and we cannot hold that the refusal to give the requested instruction was prejudicial.

A careful reading of the entire record convinces us that the railroad employees did not use wanton and willful force in ejecting the plaintiff from the train; that he put up a vigorous fight; and that they only used the necessary force to overcome his resistance, but that, after he was ejected and on the ground by the side of the car, the defendant's servant, Burnett, caught him by his feet and turned him a somersault, causing him to roll down the embankment. The jury may have found that this act of Burnett was wanton, willful, and unnecessary violence, and if they so found, under the law, the company would be liable for any injuries that may have resulted to the plaintiff. *Moore v. A., T. & S. F. Ry. Co.*, 26 Okla. 682, 110 Pac. 1059; *Folley v. C., R. I. & P. Ry. Co.*, 16 Okla. 32, 84 Pac. 1090; *C., R. I. & P. Ry. Co. v. Radford*, 36 Okla. 657, 129 Pac. 834; *St. L. & S. F. R. Co. v. Lee*, 37 Okla. 549, 132 Pac. 1072, 46 L. R. A. (N. S.) 357.

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It is also urged that the judgment is excessive. While the evidence fails to show that the plaintiff suffered any great bodily injury, still we cannot put our judgment as to the amount he was entitled to recover against that of the jury. He suffered some injury. The trial court in instruction No. 4 gave the jury the proper rule for measuring his injury and for estimating the reasonable damage resulting therefrom. The jury may have found that the plaintiff's insanity was due to heredity, or that the proximate cause thereof was the wanton and willful act of Burnett in tumbling him down the embankment after his ejection from the train.

No sufficient reason appears for disturbing the finding of the jury. We therefore recommend that the judgment appealed from be affirmed.

By the Court: It is so ordered.

PRICE v. SALISBURY.

No. 3556. Opinion Filed February 10, 1914.

(138 Pac. 1024.)

1. **MORTGAGES—Payment of Taxes—Duty of Mortgagees.** A person holding a mortgage upon real estate as security for a debt is under no obligation to pay the taxes upon such property, unless there is some provision in the mortgage requiring him to do so.
2. **SAME—Tax Sale—Right to Purchase—Mortgagees.** A person holding a mortgage on property may acquire title to the mortgaged premises by the purchase at tax sale and obtaining tax deed therefor.
3. **TAXATION—Tax Deed—Title.** A tax deed regularly issued by the county treasurer, two years having passed since the tax sale and issuance of the certificate of purchase, vests in the grantee named in such deed an absolute fee-simple title in the land therein described.

(Syllabus by Galbraith, C.)

*Error from District Court, Oklahoma County;
John J. Carney, Judge.*

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Action by James B. Price against George Salisbury for the recovery of the possession of land, and for damages. Judgment was for the defendant, and plaintiff brings error. Affirmed.

W. R. Wheeler and Giddings & Giddings, for plaintiff in error.

Everest, Smith & Campbell, for defendant in error.

Opinion by GALBRAITH, C. The plaintiff in error, as plaintiff in the court below, instituted an action March 30, 1910, in the district court of Oklahoma county, alleging that he was the owner of the legal title and entitled to the possession of the N. E. $\frac{1}{4}$ of section 13, township 14 N., range 4 W., and alleging that the possession of the same had been unlawfully withheld from him by the defendant, and prayed for the possession, damages, and for general relief. The defendant answered, first, by general denial, and, second, admitted that he was in the possession of the land described, and was and had been since the 3d day of May, 1900; and by way of cross-petition the defendant alleged that he was the owner of the premises, and in the quiet and peaceable possession thereof, and that the action instituted by the plaintiff cast a cloud over his title, and that the plaintiff was without right, title, or equity in and to said lands, or any part thereof, and prayed that plaintiff take nothing by his action, and that the title in the land described be quieted in the defendant as against the claim of the plaintiff and all persons claiming by, through, or under him since the commencement of the action.

The issues were properly joined under the pleadings as above set out, and a jury waived, and the cause submitted to the court for trial. It appeared from the evidence: That the plaintiff was the homestead entryman of the land described, and his final proof was made and certificate issued to him under date of May 9, 1894. That on June 7, 1894, the plaintiff, joined by his wife, executed a real estate mortgage on the land to W. W. Grant to secure a promissory note bearing that date and due five years thereafter, bearing interest from date, payable semiannually. That about three years after the execution of the note and mortgage

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the plaintiff and his wife abandoned the land, and took up a nomadic life, wandering from place to place for the benefit of his wife's health, as he claimed, traveling in a wagon for a period of some ten years thereafter, a portion of which time was spent in the state of Missouri. That shortly after he returned to Oklahoma he instituted this suit. That the plaintiff defaulted in the payment of interest due upon his mortgage note, and also failed to pay the taxes against the land, and the same was sold for taxes November 16, 1896, and purchased by Whit M. Grant. That Whit M. Grant, as attorney for the mortgagee, his brother, commenced an action to foreclose the mortgage on the real estate described February 16, 1897, and service was attempted to be made on the defendants by publication notice. This suit proceeded to judgment and decree, and an order of sale issued, and the land was sold by the sheriff and purchased by Whit M. Grant, the sheriff's deed to Grant being under date of April 14, 1897, and the tax deed for the land was executed to Whit M. Grant November 19, 1898. That Whit M. Grant and his wife conveyed the land to the defendant, Salisbury, by warranty deed May 3, 1900.

The court below found that the affidavit for publication service in the action of W. W. Grant against James B. Price was insufficient in form, and that the district court did not acquire jurisdiction in the foreclosure suit on account thereof, and that the sale of the land in controversy under the decree was void, and that the sheriff's deed did not convey title to Whit M. Grant. Also, that the tax deed issued by the county treasurer of Oklahoma county to Whit M. Grant November 16, 1898, did convey the land in controversy, and gave a perfect title thereto to Whit M. Grant, and that Whit M. Grant conveyed and gave a valid title to the defendant, George Salisbury. The court also made a general finding on the issues in said cause for the defendant, George Salisbury, and against the plaintiff, and found that the defendant was entitled to a decree quieting the title to the land in controversy in the defendant as prayed in his cross-petition. The court decreed according to these findings. The plaintiff ex-

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cepted to the findings, judgment, and decree, and appealed to this court by petition in error and case-made, after the overruling of his motion for new trial.

Numerous assignments are made in the petition in error; but only one is argued in the brief of counsel for plaintiff in error, that is, that Whit M. Grant could not obtain title to the land in controversy under the tax deed by reason of the fact that the mortgagee, W. W. Grant, was his brother, and that he acted as agent for his brother in making the mortgage loan, and as attorney for his brother in the foreclosure suit, and that on account of this relationship his paying the taxes accrued to the interest of his brother, the mortgagee, and the lien secured by reason thereof was merged in the mortgage lien, and was waived by failure to include the same in the foreclosure suit. In support of this contention, counsel cite the case of *Kerschenbrock v. Muff et al.*, from the Supreme Court of Nebraska, reported in 29 Neb. 530, 45 N. W. 778; *Smith v. Perkins*, from the Court of Appeals of Kansas, reported in 10 Kan. App. 577, 63 Pac. 297; *Shepherd v. Vincent*, from the Supreme Court of Washington, reported in 38 Wash. 493, 80 Pac. 777.

In the Muff case the point determined was that, where the mortgagee of real estate pays taxes on the mortgaged property to enable him to negotiate the mortgage, and subsequently sells the mortgage to the mortgagors and executes and delivers an unconditional release of the mortgage and the debt secured thereby, it was held that the mortgagee could not afterwards maintain an action against the mortgagor for the amount of the taxes so paid.

In the Perkins case one of the points determined was that, where the mortgagee procures a tax deed to the mortgaged property, this fact does not bar him from bringing a suit to foreclose the mortgage, for the reason that, since the rule that such tax deeds destroy all other titles and liens only relates to adversary claims, the money paid for the tax title is not within the rule of merger. This holding, as we understand it, is directly contrary to the contention of the plaintiff in error in this case.

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In the Vincent case, *supra*, it was determined that a mortgagee by the purchase of an outstanding tax title could not disturb the title of the mortgagor, and this holding was based upon an express statute of the state of Washington.

It will be observed that these authorities, in so far as they do not hold directly against the contention of the plaintiff in error, give no support to his contention. The evidence in the case at bar shows that the mortgagee did not pay the taxes, and that the mortgagee did not obtain or attempt to obtain the tax title to the land in controversy. It shows that W. W. Grant, the mortgagee, and Whit M. Grant, the holder of the tax title, are two separate and distinct individuals, although they are brothers, and there is no finding by the court below that Whit M. Grant, in paying the taxes on the mortgaged premises, acted as agent of his brother, the mortgagee, and there is no attempt to show this agency except by inference. The positive testimony is to the contrary. However, this is immaterial, as will hereafter appear. If Whit M. Grant was acting as agent for the mortgagee in paying the taxes on the mortgaged premises, and in securing the tax title, there could be no merger of liens, in this instance in any event, and the bringing of the foreclosure suit, without including the tax lien therein, could not bar the assertion of the tax title, for the reason that the court below held that on account of the defective affidavit for publication service the court acquired no jurisdiction in the foreclosure suit, and the decree of sale and the deed were absolutely void. The plaintiff in error did not appeal from that judgment and finding, and there is no cross-appeal by the defendant in error, so that judgment is final. The case stands, so far as the foreclosure proceeding is concerned, as though no foreclosure suit had ever been filed by the mortgagee. A waiver of a right cannot be predicated upon an absolutely void proceeding.

However, the question presented by this appeal seems to have been foreclosed against the contention of the plaintiff in error by the decision of the Supreme Court of Oklahoma Terri-

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tory in *Jones v. Black*, 18 Okla. 344, 88 Pac. 1052, 90 Pac. 422, 11 Ann. Cas. 753. The first and second paragraphs of the syllabus are as follows:

“(1) A person holding a mortgage upon real estate as security for a debt is under no obligation to pay the taxes upon such property unless there is some provision in the mortgage requiring him to do so.

“(2) A person holding a mortgage upon property may acquire title to the mortgaged premises by the purchase at tax sale and obtaining tax deed therefor.”

If the mortgagee could obtain this tax title to the mortgaged premises, it follows, of course, that the brother of the mortgagee could obtain it, whether he acted in his individual capacity or as agent for the mortgagee. It appears from the record that the plaintiff in error made no attempt to redeem the land from the tax sale within the two years given by section 6034, Wilson's Rev. & Ann. St. 1903, and that the tax deed was regularly issued after the expiration of two years from the date of the sale and the issuance of the certificate. The effect of this tax deed as declared by section 6036, Wilson's Rev. & Ann. St. 1903, was that it “shall vest in the grantee an absolute estate in fee simple in such lands.” The tax deed introduced in evidence appeared to be regular upon its face, and the trial court was justified in finding, as a matter of law, that the same vested a fee-simple title to the premises in controversy in Whit M. Grant, and was also justified in decreeing, under the cross-petition, that the title to the premises in controversy was in the defendant in error, and in quieting the title therein in him against the claim of the plaintiff in error and all persons claiming by, through, or under him since the commencement of the action.

The errors assigned are without merit, and the judgment appealed from should be affirmed, with costs.

By the Court: It is so ordered.

Chidsey et al. v. Ellis et al.

CHIDSEY *et al.* v. ELLIS *et al.*

No. 3575. Opinion Filed February 10, 1914.

(138 Pac. 789.)

APPEAL AND ERROR—Dismissal—Failure to File Briefs. Where the plaintiff in error, as well as the defendant in error, fails to file and serve brief as required by rule 7 (38 Okla. vi) of this court, it will be presumed that the appeal has been abandoned, and it should be dismissed.

(Syllabus by Galbraith, C.)

Error from District Court, Murray County:
R. McMillan Judge.

Action by J. C. Chidsey and others against D. F. Ellis and others. From the judgment, Chidsey and others bring error. Dismissed.

H. M. Carr and J. B. Thompson, for plaintiffs in error.

W. N. Lewis and Ledbetter, Stuart & Bell, for defendants in error.

Opinion by GALBRAITH, C. The petition in error and case-made in this case was filed with the clerk of this court February 5, 1912, and the case was regularly submitted January 19, 1914. Neither party has filed briefs, as required by rule 7 (38 Okla. vi) of this court, and the appeal must therefore be taken as abandoned, and should be dismissed.

By the Court: It is so ordered.

Eads v. Ottawa County et al.

EADS v. OTTAWA COUNTY *et al.*

No. 3586. Opinion Filed February 10, 1914.

(138 Pac. 796.)

APPEAL AND ERROR—Dismissal—Failure to File Briefs. Where the plaintiff in error, as well as the defendant in error, fails to file and serve brief as required by rule 7 of this court (38 Okla. vi), it will be presumed that the appeal has been abandoned, and it should be dismissed.

(Syllabus by Galbraith, C.)

*Error from County Court, Ottawa County:**W. Y. Quigley, Judge.*

Action by D. H. Eads against Ottawa County and J. H. Connolly, its treasurer, relative to placing lands on the tax rolls for the year 1909, purchased from an Indian allottee in December, 1908, the deed for which was not approved by the Secretary of the Interior until April 9, 1909. From a judgment for the defendants, the plaintiff brings error. Dismissed.

*Thompson & Mason, for plaintiff in error.**E. C. Fitzgerald, for defendants in error.*

Opinion by GALBRAITH, C. The petition in error and case-made was filed with the clerk of this court February 12, 1912, and the cause was regularly submitted January 19, 1914. No brief has been filed by the plaintiff in error, as required by rule 7 of this court (38 Okla. vi). In fact, briefs have not been filed by either party.

Upon authority of eleven cases reported in 36 Okla. (see page 820) and six cases in volume 37 Okla. reports (see page 821), and numerous decisions reported earlier, this appeal should be dismissed.

By the Court: It is so ordered.

GLASS *et al.* v. GOULD.

No. 3619. Opinion Filed February 10, 1914

(138 Pac. 796.)

1. **APPEAL AND ERROR—Record—Review on Transcript.** In an appeal by petition in error and transcript, errors assigned requiring an examination of the evidence cannot be reviewed, for the reason that the evidence is not properly preserved by the transcript, even though set out therein and certified by the clerk of the trial court.
2. **SAME.** Errors appearing from the record proper may be reviewed by this court on a transcript.
3. **RECEIVERS—Application for Appointment—Hearing.** A judge of the district court in a proper case may hear an application for the appointment of a receiver at chambers, at a point in the judicial district outside of the county wherein the action is pending in which the receiver is asked.

(Syllabus by Galbraith, C.)

*Error from District Court, Okmulgee County;**R. C. Allen, Judge.*

Action by George F. Gould against John E. Glass and another on debt and to foreclose a real estate mortgage on property located in the city of Okmulgee. The plaintiff served notice that he would, on a day named, present a motion and application to the judge of the district court at Sapulpa for the appointment of a receiver to take charge of the mortgaged property. A hearing was had and a receiver appointed, and the defendants bring error. Affirmed.

James M. Hays, for plaintiffs in error.

I. H. Cox, for defendant in error.

Opinion by GALBRAITH, C. This is an appeal from an order made at chambers at Sapulpa in the Twenty-second judicial district of Oklahoma, appointing a receiver in an action pending in the district court of Okmulgee county in said district, for judgment on a note and to foreclose a real estate mortgage given

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to secure same. The appeal is by petition in error and transcript. The assignments of error are: First, that the decision and judgment of the court is not sustained by sufficient evidence and is contrary to law. Second, that the finding and judgment of the court is contrary to law and the Constitution of the state, and not supported by legal and sufficient evidence, and for want of jurisdiction of the court to try the cause upon a motion at a point outside of Okmulgee county, Okla.

These assignments of error, it will be observed, except the latter part of the second, require an examination of the evidence for their determination. It is settled by an unbroken line of decisions of this court that the evidence introduced on the trial of a cause must be brought to this court for review by bill of exceptions or case-made, and that the evidence is not brought up by transcript, although the same is set out in the transcript and properly certified by the clerk of the trial court. The evidence offered at the hearing of the motion for the appointment of a receiver, and upon which the presiding judge appointed the receiver, not being embodied in a bill of exceptions or case-made, cannot be considered upon the transcript, and for that reason the assignments, except that challenging the jurisdiction of the court to hear the motion at chambers, outside of the county where the foreclosure suit was pending, cannot be considered.

In *McMechan v. Christy*, 3 Okla. 301, 303, 41 Pac. 382, 383, the court said:

“Upon a transcript of the record no questions can be considered, except those which appear from a consideration of the record as made in the court below, and the errors assigned not being presented upon the transcript, and no bill of exceptions or case-made having ever been filed in the court below, nothing is presented for our consideration in this case, and the judgment below is affirmed, with costs against the plaintiff in error.”

Again, in *City of Kingfisher v. Pratt*, 4 Okla. 284, 43 Pac. 1068, the first paragraph of the syllabus reads as follows:

“Matters which are not by statute authorized to be made a part of the record except by case-made or bill of exceptions cannot be brought to this court on a certificate of the clerk, and errors assigned thereon.”

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Again, in *Homeland Realty Co. v. Robison*, 39 Okla. 591, 136 Pac. 585, it is said:

"Unless an alleged error appears in the record proper, it cannot be considered in an appeal by transcript."

And in *Menten v. Shuttee*, 11 Okla. 381, 67 Pac. 478, the second paragraph of the syllabus reads:

"The record proper in a civil action consists of the petition, answer, reply, demurrers, processes, rulings, orders, and judgments. And incorporating motions, affidavits, or other papers into a transcript will not constitute them a part of the record, unless made so by bill of exceptions."

And the third paragraph of the syllabus reads:

"Motions and proceedings which are not part of the record proper can only be presented for review by incorporating them into a case-made, or by preserving them by bill of exceptions and embracing them in the transcript."

See, also, *Lookabaugh v. La Vance*, 6 Okla. 358, 49 Pac. 65; *Kingman & Co. v. Pixley*, 7 Okla. 351, 54 Pac. 494; *Belcher v. Wasson*, 13 Okla. 648, 75 Pac. 1131.

In *Nelson v. Glenn*, 28 Okla. 575, 576, 115 Pac. 471, it is said by Mr. Justice Kane, speaking for the court:

"All of the errors assigned by the plaintiffs in error are such that it would be necessary for this court to examine the evidence in order to review them. This we cannot do, because the evidence is not made a part of the record. It has been held by this court many times that the evidence taken in the case is not part of the record, unless made so by bill of exceptions or case-made."

See, also, *Tribal Development Co. v. Roff et al.*, 36 Okla. 74, 125 Pac. 1124.

It thus appears that the only question that is presented by the record in this case for determination by this court is whether or not the presiding judge of the Twenty-second judicial district had authority to hear the motion and application for the appointment of a receiver outside of Okmulgee county, where the foreclosure suit was pending. Section 4979, Rev. Laws 1910, authorizes a judge of the district court to appoint a receiver "in actions by mortgagee for the foreclosure of his mortgage and sale of the mortgaged property," etc. If the judge can make

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the appointment, he can, as a matter of course, hear motions to make the appointment at chambers. No reason appears why he could not hear this application and make the appointment—exercise the jurisdiction invoked—at chambers, at Sapulpa, which is a part of the Twenty-second judicial district, just as well as at Okmulgee. It is shown that notice was duly given of the time and place that the application for the appointment of receiver would be made; that the defendants in the mortgage foreclosure suit were present by counsel and resisted the application; that the application and motion were heard and the appointment made. It thus appears that the judge had jurisdiction to make the appointment at chambers at Sapulpa. See *Grayson v. Perryman*, 25 Okla. 339, 106 Pac. 954.

No sufficient reason appears for reversing the order appealed from, and we therefore recommend that it be affirmed.

By the Court: It is so ordered.

TERRY v. COKER.

No. 3625. Opinion Filed February 10, 1914.

(138 Pac. 814.)

APPEAL AND ERROR—Failure to File Brief—Dismissal. Where plaintiffs in error file no brief, as required by rule 7 of this court (38 Okla. vi), the appeal will be dismissed for want of prosecution.

(Syllabus by Brewer, C.)

Error from County Court, Le Flore County:
P. C. Bolger, Judge.

Action by Troy Coker, by his father and next friend, Ed Coker, against George W. Terry. Judgment for plaintiff, and defendant brings error. Dismissed.

Tom W. Neal, for plaintiff in error.

Hale & Lunsford, for defendant in error.

Miles v. Bird.

Opinion by BREWER, C. The petition in error and transcript of the record in this case was filed in this court February 23, 1912. The plaintiff in error has failed to file any brief in the cause, as required by rule 7 of this court (38 Okla. vi). The petition in error shall therefore be dismissed for want of prosecution. *Hass et al. v. McCampbell*, 27 Okla. 290, 111 Pac. 543; *Maddin v. McCormick et al.*, 27 Okla. 778, 117 Pac. 200, and cases cited.

By the Court: It is so ordered.

MILES v. BIRD.

No. 3634. Opinion Filed February 10, 1914.

(138 Pac. 789.)

APPEAL AND ERROR—Scope of Review—Failure to File Brief. Where the plaintiff in error has filed a brief, and the defendant in error has filed none, and has given no excuse for his failure, and upon examination of the record it appears that the errors asserted are well founded, this court is not required to search for some theory, or for authorities, that might possibly save the judgment appealed from.

(Syllabus by Brewer, C.)

*Error from County Court, Grant County;
E. H. Breeden, Judge.*

Action between O. L. Miles and Ben W. Bird. From the judgment, Miles brings error. Reversed and remanded.

Sam P. Ridings, for plaintiff in error.

C. S. Ingersoll and *F. G. Walling*, for defendant in error.

Opinion by BREWER, C. This appeal by case-made was filed in this court February 27, 1912. The plaintiff in error filed brief on May 29, 1912. The defendant in error has not filed a brief, and has given no reason for not doing so.

We have examined the errors assigned in the brief for plaintiff in error, and the record upon which they are predicated, and

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the grounds urged for reversal appear to be well taken. In such situation we are not required to search the record, or to hunt for authorities, to find some theory upon which the judgment may possibly be sustained. *Butler v. McSpadden*, 25 Okla. 465, 107 Pac. 170; *Ellis v. Outler*, 25 Okla. 469, 106 Pac. 957; *Buckner v. Oklahoma Nat. Bank*, 25 Okla. 472, 106 Pac. 959; *Reeves & Co. v. Brennan*, 25 Okla. 544, 106 Pac. 959; *Sharpleigh Hdw. Co. v. Pritchard*, 25 Okla. 808, 108 Pac. 360; *Butler v. Stinson*, 26 Okla. 216, 108 Pac. 1103; *School Dist. v. Shelton*, 26 Okla. 229, 109 Pac. 67, 138 Am. St. Rep. 962; *Flanagan v. Davis*, 27 Okla. 422, 112 Pac. 990; *M., K. & T. Ry. Co. v. Long*, 27 Okla. 456, 112 Pac. 991; *Phillips v. Rogers*, 30 Okla. 99, 118 Pac. 371; *Doyle v. School Dist.*, 30 Okla. 81, 118 Pac. 386; *Bank of Grove v. Dennis*, 30 Okla. 70, 118 Pac. 570; *Hawkins v. White*, 31 Okla. 118, 120 Pac. 561; *Rudd v. Wilson*, 32 Okla. 85, 121 Pac. 252; *Reynolds-Davis & Co. v. Hotchkiss*, 31 Okla. 606, 122 Pac. 165; *First Nat. Bank v. Blair*, 31 Okla. 562, 122 Pac. 527; *I'an Arsdale-Osborne Brokerage Co. v. Patterson*, 30 Okla. 113, 120 Pac. 933.

The cause should be reversed and remanded for a new trial. By the Court: It is so ordered.

 BANK OF STILWELL v. MORRIS.

No. 3650. Opinion Filed February 10, 1914.

(138 Pac. 790.)

APPEAL AND ERROR—Case-Made—Review of Errors. Under section 5242, Rev. Laws 1910, the case-made, after being settled by the trial judge in the manner provided in said statute, must then "be filed with the papers in the case," and unless so filed errors assigned requiring an examination of exceptions set out in the case-made cannot be reviewed in this court, and the appeal will be dismissed.

(Syllabus by Galbraith, C.)

Error from County Court, Adair County;
W. A. Corley, Judge.

Spitzer et al. v. City of El Reno et al.

Action by Mary J. Morris against the Bank of Stilwell and another for failure to pay check on presentation. From a judgment for the plaintiff, the defendant named brings error. Dismissed.

R. Y. Nance, for plaintiff in error.

Opinion by GALBRAITH, C. This is an appeal by petition in error and case-made. The record, however, presents no question to this court for review, for the reason that the case-made was not "filed with the papers in the case" in the trial court as required by section 5242, Rev. Laws 1910. This requirement is jurisdictional, and a compliance therewith is necessary to give this court power to review the errors assigned. *Graham et al. v. Atwood*, ante, 136 Pac. 1080.

The petition in error was filed in this court January 30, 1912. The time for correcting a defect of this character has expired by limitation.

The appeal should therefore be dismissed.

By the Court: It is so ordered.

SPITZER *et al.* v. CITY OF EL RENO *et al.*

No. 2849. Opinion Filed August 6, 1913.

Rehearing Denied February 12, 1914.

(138 Pac. 797.)

MUNICIPAL CORPORATIONS—Special Assessment—Distribution of Fund—Injunction. The city of El Reno contracted with the paving company for the construction of certain street improvements under the provisions of the Paving Laws of 1907-08 (Sess. Laws 1907-08, c. 10, art. 1). After signing of contract and issuance of bonds, the work was, for some reason, delayed, and by reason of such delay a large amount of interest accrued on the bonds. The contractor was to take the bonds at par in exchange for the improvement, the total cost of which was \$421,258.77, to be paid in ten equal installments. The first and second installments were paid prior to the completion of the work. When the improvement was completed, the paving company claimed all the bonds and interest remaining in the hands of the city treasurer, which included the interest accrued during the time the work

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was delayed. The city refused to pay this amount. A compromise was effected, by which the bonds were delivered to the paving company, and it paid back to the city the sum of \$14,549.17 in cash, in lieu of the accrued but unearned interest. This was an excess sum derived from assessments paid by the property owners for the purpose of paying the first installment, but which, by reason of the compromise, was not needed for that purpose. The city also had in its possession \$7,500 derived from the enforcement of the 18 per cent. penalty on the first assessment which the property owners had refused to pay until the causes occasioning the delay in the work had been removed. These two sums the city proposed to repay to the property owners, for the reason that there was no other use or purpose to which they could legitimately be diverted. The special assessment already levied was ample to take care of and pay all subsequent installments. The owners of the bonds (they having been sold to other parties by the paving company) brought injunction proceedings against the city to prevent this proposed distribution. **Held:**

(a) Such sums, having been improvidently collected from the various property owners, in excess of the amount actually needed, did not partake of, nor were they in any wise clothed with, the characteristics of the trust fund designed by statute for the payment of the various installments of assessments.

(b) The scheme of the statute is to raise only such sum by special assessment as will pay the actual cost and expense of the proposed improvement.

(c) It is not the intent of the law to create a surplus in said fund or in any of said funds; each year's assessment is designed to take care of and pay its installment and interest and no more.

(d) Each lot and parcel of land in the improvement district must bear its equal share in the total cost and no more.

(e) No property owner can be assessed more than his legitimate share, in order to make up, or secure the payment of, any delinquency on the part of any other property owner.

(f) If one is, for any reason, required to or does pay into said fund any more than his legitimate assessment, the surplus, in equity, belongs to him.

(g) These sums in dispute, by misfortune or miscalculation, were exacted in excess of the sums actually due the fund, and those who paid it in are, in equity, entitled to have the same refunded to them.

(h) The bondholders have no interest, direct or indirect, in said sums or any part thereof, and are not entitled to injunction to prevent its distribution.

(i) The question of whether, or not, the proposed distribution is in accordance with the law, not being properly before us, is not decided.

(Syllabus by Robertson, C.)

Error from District Court, Canadian County:

John J. Carney, Judge.

Spitzer et al. v. City of El Reno et al.

Action by Ceilan M. Spitzer and others against the City of El Reno and others. Judgment for the city, and plaintiffs bring error. Affirmed.

M. D. Libby, for plaintiffs in error.

Lucius Babcock, for defendants in error.

Opinion by ROBERTSON, C. This was an injunction proceeding in the district court of Canadian county, by Ceilan M. Spitzer and others, partners, doing business as Spitzer & Co., Bankers, against the city of El Reno. At the commencement of the suit, the city was governed by a mayor and eight councilmen. During the litigation the city changed from aldermanic, to commission, form of government, and this cause, by agreement of parties, now proceeds against the city of El Reno, P. P. Duffy, *ex officio* mayor, John V. Koogle, and Davis Guion, commissioners, as defendants in error. The object of the injunction was to prevent said defendant city and its officers from appropriating or issuing orders or warrants upon, or paying out, a certain special fund then in the hands of the city treasurer and derived from assessments levied against private property for street improvements for any purposes whatever, save and except in payment of bonds issued for said street improvements, and interest, at maturity, and from appropriating, or paying out, interest collected on said assessments or reimbursed and repaid into said special fund by the Cleveland Trinidad Paving Company, by virtue of a certain settlement theretofore made and entered into between said city and said paving company, except in regular payment of said bonds and interest. The city answered by general denial and, in addition, set up and relied upon a certain compromise agreement made in November, 1910, between the Cleveland Trinidad Paving Company and said city, whereby said city agreed to deliver to the said paving company certain bonds in settlement of the contract in paving district No. 2, and the said paving company was to pay to the said city the sum of \$14,549.17; that the said paving company accepted the terms and conditions of said agreement and paid said money to said city, and that said

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payment was unconditional, and attached a copy of said agreement to its answer as an exhibit, and relied upon the settlement set out in said agreement as a full and complete adjustment of all the differences between said paving company and said city. The cause was tried to the court on an agreed statement of facts, except as to one or two points which will be hereafter noted, and resulted in a judgment against the plaintiffs and in favor of the city, denying the injunction and taxing the costs to the petitioners. From this judgment the plaintiffs appeal.

The facts necessary for a thorough understanding of the controversy are, briefly stated, as follows: The plaintiffs are a partnership doing business in the city of Toledo in the state of Ohio. The city of El Reno is a municipal corporation and city of the first class under the laws of the state of Oklahoma. On the 16th day of September, 1908, said city adopted a resolution whereby it was declared that the grading, paving, curbing, guttering, and draining of certain streets and avenues in said city was necessary, and that the cost and expenses of such improvements should be paid by special assessments levied, as provided by law, upon the lots and parcels of land liable to assessment for the same, all of which lots and parcels of land were fully set out and described in said resolution, and the said resolution was passed and published in conformity to law.

On October 20, 1908, at an adjourned regular meeting of the mayor and councilmen of said city, a resolution was regularly adopted, which recited that no sufficient protest on the part of the property owners had been filed against the making of such improvements and expressed the determination to proceed with the improvements, which were in said resolution defined minutely, and instructed the city engineer to proceed to prepare the necessary plans, plats, profiles, and specifications and estimate of cost, and to advertise for a contractor. That the city engineer did thereafter present plans and specifications and estimate of costs, and the same were adopted by the city by resolution and described said improvements as street improvement district No. 2. That thereafter, at the time and place specified in the notice, the mayor and councilmen of said city in regular session examined the bids

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received, and awarded the contract for furnishing the material and performing the work necessary in making said improvements to the Cleveland Trinidad Paving Company, it being the best and lowest bidder, and did thereafter make and enter into a contract with said paving company in the name of the city, in accordance with the terms of said award. That thereafter the said mayor and said council, by resolution duly made and entered, did appoint a board of appraisers, who, in accordance with the terms of the statute, made appraisal and apportioned the benefits of the several lots and parcels of land liable to assessment for the cost of the said improvement, which said appraisal and assessment was returned and filed with the city clerk in accordance with the terms of the statute. That thereafter by resolution the said mayor and council appointed a place and time for holding a session for the purpose of hearing complaints or objections concerning said appraisal and apportionment, and, after due consideration thereof, did adopt a resolution confirming said appraisements and apportionments, and that thereafter the said mayor and council did adopt and approve, and cause to be published in the manner provided by law, a certain ordinance, and did thereby levy assessments in accordance with said appraisements and apportionment as confirmed, against the several lots and parcels of land liable to assessment for the payment of the costs of said improvement. That the first installment of said assessment fell due on the 1st day of September, 1909, together with interest at the rate of seven per cent. per annum on the whole assessment from the date thereof, and the city clerk did publish in two consecutive issues of the daily paper published in said city a notice advising the owners of property affected by such assessments, of the date when such installment and interest would be due, designating the streets and avenues and parts thereof for the improvement of which such assessments were levied, and that unless the same should be promptly paid such installment would bear interest at the rate of eighteen per cent. per annum thereafter until paid, and that proceedings would be taken according to law to collect such installment and interest

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Numerous property owners failed, neglected, and refused to pay the said first installment to the city clerk within the time prescribed, after March 19, 1909, the date of the passage of the ordinance levying the assessments, and refused to pay such installments with interest on or before the 1st day of September, 1909. That the amount of said first installment, due and payable on the 1st day of September, 1909, and remaining unpaid, amounted to \$42,258.77, and the accrued interest on the whole assessment due and payable, on the said date and remaining unpaid, amounted to \$13,269.65. That the said city clerk thereafter and on the 1st day of September, 1909, certified said first installment and interest remaining unpaid to the county treasurer of Canadian county, to be by that officer placed on the delinquent tax list of said county and collected as other delinquent taxes are collected. That the same was placed upon the said delinquent tax list, and was collected with interest and cost as provided by law, and the said county treasurer did pay over to the said city treasurer the whole amount of said installment and interest collected by him, for disbursement, in accordance with the provisions of law.

After the expiration of 30 days from the date of the passage of the assessing ordinance, as aforesaid, the mayor and council of said city, in regular session, determined the amount of the assessments remaining unpaid to be the sum of \$421,258.77, and by resolution adopted on the 16th day of June, 1909, provided for the issuance of coupon bonds in accordance with the terms of the contract in the last-named amount, bearing date of April 1, 1909, and interest at the rate of 6 per cent. per annum from date, payable annually, and 10 per cent. per annum after maturity until paid, and divided said sum into ten equal installments as provided by statute. By the terms of the contract the paving company was to accept the street improvement bonds in payment for work done, the city was to pay the paving company for work and material furnished upon monthly estimates of the city engineer as the work progressed, provided that 10 per cent. of each of said estimates should be retained by the city until the work was completed and accepted. The paving company was

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to purchase and pay par value for a certain portion of the street improvement bonds, amounting to $2\frac{1}{2}$ per cent. of the aggregate amount, which was issued to pay the cost of engineering, appraisalment, inspection, and other expenses incidental to carrying out the contract. Of the said bonds in the aggregate amount of \$421,258.77, \$10,235.57 represented that portion of the bonds issued to pay the cost of the engineering, etc., and the balance of \$411,023.20 represented the amount of bonds to be received by the paving company in payment of its contract, when the mayor and the council accepted the same.

The said city, in accordance with the contract, did execute the bonds for the full amount, with interest coupons attached, and from time to time, upon estimates furnished by the city engineer and approved by the mayor and council, did deliver said bonds in installments with coupons attached to said paving company, for the full amount of said issue, of \$421,258.77, of bonds and the said company did from time to time, coincident with the delivery of such installments, pay to the city the sum due it for said engineering and other expenses incident to carrying out the contract, and to the full amount of \$10,235.57. The paving company, on or prior to December 2, 1910, sold and delivered the said bonds to the plaintiffs in error for a valuable consideration, who thereby became and are now the owners and holders thereof, except such portion of bonds and interest coupons as were paid to the said paving company as hereafter stated. That the said bonds maturing on September 15, 1909, in the sum of \$42,258.77, principal and interest coupons on the whole series of bonds which were due and payable on September 15, 1909, in the further sum of \$11,339.99, and interest coupons on the whole residue of principal due and payable on September 15, 1909, in the further sum of \$22,740, the said plaintiffs did not become the owners of, and the said sum was paid direct to the said paving company by the said city treasurer, prior to the 2d day of September, 1910, and all the said interest except approximately \$10,000 was so paid to said paving company prior to November 1, 1910, and the money so paid out was the money collected as aforesaid by the county treasurer of said county, upon the first

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installment of assessment so certified to him by the city clerk for collection as aforesaid, which bonds and coupons, so presented, surrendered, and paid, the said city treasurer did cancel and now retains the same. The second installment of bonds due and payable on September 15, 1910, was paid to plaintiffs. Thus bonds numbered consecutively from 1 to 85, inclusive, aggregating the sum of \$84,258.77 principal, and all interest coupons on the entire issue of bonds due and payable September 15, 1910, and prior thereto, have been paid and none other.

On the 1st day of November, 1910, a final settlement was made between the paving company and the city for the work of improvement, and at such time the city held of said \$421,258.77, bonds numbering 368 to 423, inclusive, aggregating \$55,500, and also held the coupons to said bonds attached, of which coupons so attached \$1,498.50 had matured and were due and payable on the 15th day of September, 1909, \$3,330 had matured and was due and payable on the 15th day of September, 1910, and in addition to the said \$55,500 and the said coupons as aforesaid, the said city held possession, conditionally, of certain coupons theretofore detached from bonds, numbering consecutively 291 to 296, inclusive, and 317 to 367, inclusive, and some others; the total so conditionally held aggregating \$4,959. On November 1, 1910, the items remaining unpaid to the paving company under the contract were as follows: Ten per cent. on estimates amounting to \$39,905.71; bonds for engineering, etc., expenses, \$3,272.32; final estimate on completed work, \$11,968.67; amount theretofore allowed on estimates but being less in the aggregate than one bond and for which no bond had been issued, \$353.30—a total of \$55,500 undelivered bonds due the company. All other bonds and coupons of said issue than these last above stated had been delivered to the company.

On the 1st day of November, 1910, in order to settle the differences existing between the paving company and the city, the following agreement was made and entered into:

“Be it resolved, by the mayor and councilmen of the city of El Reno, as follows: Section 1. That the city of El Reno deliver at once to the said The Cleveland Trinidad Paving Com-

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pany all of the bonds and coupons now in its possession or retained by it which the mayor, and council of said city have heretofore authorized the issue of for the purpose of paying for the improvement to be made in said street improvement district No. 2. Section 2. That the Cleveland Trinidad Paving Company shall pay to the city of El Reno the sum of fourteen thousand five hundred forty-nine and 17-100 dollars (\$14,549.17) being part of the accrued interest on said bonds. Section 3. That the delivery of said bonds to the Cleveland Trinidad Paving Company shall be made and accepted as in full payment, settlement, and satisfaction of any and all sums due and owing to the Cleveland Trinidad Paving Company for all work done by it in the performance of its aforesaid contract for improvements made in said street improvement district No. 2, including any and all claims for damages resulting from any act, neglect or default of the city or its public officials which in any manner interfered with the performance of said contract. Section 4. That the payment by the Cleveland Trinidad Paving Company of the sum of fourteen thousand five hundred forty-nine and 17-100 dollars (\$14,549.17) as aforesaid shall be made and accepted by the city of El Reno as in full for the part of the accrued interest upon the aforesaid bonds which the said city is or might be entitled to retain. Section 5. That this resolution shall be in force and effect from and after its passage, and approval by the mayor, and its acceptance in writing by the said The Cleveland Trinidad Paving Company, which acceptance by the Cleveland Trinidad Paving Company shall be filed with the clerk of said city within five (5) days from and after the passage thereof. Passed and approved this 1st day of November, 1910. J. A. Labryer, Mayor. Attest: F. T. Stackpole, City Clerk. Accepted November 2, 1910. The Cleveland Trinidad Paving Company, by M. F. Bramley, President."

Whereupon the city delivered to the paving company the bonds and coupons held by it as aforesaid, on the 1st of November, 1910, and the paving company paid the city the sum of \$14,549.17. The payments were effected as follows: The \$35,500 bonds and coupons attached were forwarded by the city to plaintiffs in error, with instructions to collect the said sum of \$14,549.17 from, and deliver the said bonds to, the said paving company, and to forward said sum so collected, to wit, \$14,549.17, to the fiscal agency of the state of Oklahoma in the city and state of New York, for credit of the city of El Reno to pay said street

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improvement bonds and interest coupons, there presented for payment at maturity. The \$14,549.17 was collected from the paving company, and forwarded to the fiscal agency, and the bonds were delivered to the paving company, and the money collected and forwarded to the fiscal agency was applied on the payment of bonds and coupons of said issue prior to the adoption of resolution of the mayor and council hereinbefore referred to. The detached coupons held by the city and delivered to the paving company were presented to the city treasurer and by him paid and canceled prior to the adoption of the resolution of the mayor and council hereinbefore referred to. On the 2d day of December, 1910, the mayor and councilmen in adjourned regular session adopted two resolutions, as follows:

"Whereas, there now remains in the hands of the city treasurer of the city of El Reno, Oklahoma, the sum of \$14,549.77, the same being the amount of money received as the result of a settlement by and between the city council of said city and the Cleveland Trinidad Paving Company of Cleveland, Ohio, of the unearned interest on street improvement bonds in paving district No. 2, of El Reno, Oklahoma; and, whereas, the work of improving the streets and alleys is completed and accepted in said district No. 2, as shown by the records of the council proceedings November 1, 1910; and, whereas, the sum of \$14,549.77 now remains on hand and properly belongs to the property owners of said paving district No. 2, as hereinafter set forth: Now, therefore, it is hereby resolved and ordered by the mayor and city council of the city of El Reno, Oklahoma: That the city clerk of the said city and state shall divide the sum of \$14,549.77 by the total contract price, to wit, after deducting from the total contract price the amounts paid in full by the property owners in paving district No. 2, which property owners made settlement in full from this paving and got the benefits of a 10 per cent. discount or reduction thereon. That the same be and is hereby ordered prorated back to the owners of the lot or lots in said paving district No. 2, to wit: by multiplying the quotient so obtained by the above division as mentioned, by the total paving assessment against any lot or lots in said paving district No. 2, upon which settlement in full has not been made. After giving the said city clerk fifteen days from the date of the passage of this resolution to determine the proper amount to credit to each lot or lots as above provided, the owners of all lots entitled to a rebate under this resolution may file bills or claims for the

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amounts due them in the manner and form of all other claims against said city are filed for allowance by the said city council and warrants therefor shall be drawn and issued in favor of the said lot owners on this special fund in the way and manner as provided for other claims against the said city. Passed and approved this 2d day of December, 1910. J. A. Labryer, Mayor. Attest: F. T. Stackpole, City Clerk. [Seal.]”

“Be it resolved by the mayor and council of the city of El Reno, Oklahoma, in council assembled: That, whereas, the county treasurer of Canadian county collected from various owners of lots in paving district No. 2, of the city of El Reno, certain penalties on account of the paving taxes in said district, to wit, 18 per cent. on the total assessment and interest from September, 1909, until the time of the payment of the same; and, whereas, only 7 per cent. on the said assessment are required to pay the paving bonds issued for the payment of the said district and the said excess properly belongs to the respective parties so paying the same: Now, therefore, be it resolved by the mayor and councilmen of the city of El Reno, Oklahoma: That the said excess of penalty be refunded to the respective parties paying the same before the sale of lots for delinquent paving taxes in said district in June, 1910, and that the holder of receipts therefor may present the same to the city clerk, and the said amount may be ascertained, and when so determined that warrants may be issued therefor on the penalty fund to such parties for the said penalties so determined. Passed and approved this 2d day of December, 1910. J. A. Labryer, Mayor. Attest: F. T. Stackpole, City Clerk. [Seal.]”

Said resolutions are in effect unmodified, unrepealed, and it is the intent of the city to exercise the authority therein conferred to pay out and disburse from said special fund the amounts named in said resolutions and for the purpose therein stated.

The penalties mentioned in the last resolution above on the first installment of assessment from September 1, 1909, to the time said first installment was collected by the county treasurer, amounts approximately to \$7,500, and the excess of interest over and above 7 per cent. on the same installment for the same period of time, *i. e.*, 11 per cent., amounts to approximately \$4,583. By reason of the application of the said \$14,549.17 to the payment of bonds of the series which matured September 15, 1910, and which were paid at the fiscal agency of the state of Oklahoma

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in the city and state of New York, the assessment fund in the hands of the city treasurer of the city of El Reno now contains a like sum, which, had it not been for the payment of the said \$14,549.17, by the fiscal agency, as aforesaid, would have been applied in payment of said matured bonds. There is no contest between the parties concerning the validity of the proceedings or any of them hereinabove referred to, on which the contract for the making of the said improvements, the said assessments, and the issue of bonds are based, and the validity of the contract, assessments, and series of bonds are likewise admitted by the parties.

The above facts were submitted to the trial court by the parties in an agreed statement. In addition to this, the plaintiffs submitted the deposition of Horton C. Rorick, one of the plaintiffs, in support of the allegation of damages and injury which plaintiffs, as owners of the outstanding bonds, might sustain by carrying into effect the resolution above set out. In addition to the above, the city offered evidence tending to show that the said sum of \$14,549.77 belonged to the city of El Reno in its corporate capacity, and that the same was no part of the special assessment fund. Upon these facts the court found that plaintiffs were not entitled to the relief prayed for and dismissed their petition, and they bring error and predicate the same on the following assignments, to wit: (1) That the orders dissolving the temporary injunction and the final judgment are not sustained by sufficient evidence and are contrary to law; and (2) error of law occurring at the trial in the admission of certain evidence.

It will be observed that there are two items over which this controversy arose, viz., \$7,500, derived from the penalty of 18 per cent. on delinquent assessments, and \$14,549.77 accrued interest on the bonds, or first installment of assessment, accumulated thereon while a controversy existed between the city and paving company, and before the bonds representing the payment of installment of the work performed during said controversy had been delivered to the paving company, and which said latter sum was ascertained and determined by the parties through the final settlement, and which was part of the consideration

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therefor. The city, after making final settlement with the paving company, found itself in the possession of these two sums, and the same having been derived from special assessments, for a particular and specific purpose, and not in any wise belonging to the city as a municipality, but it holding the same as a trustee, or stakeholder, attempted, by the two resolutions adopted December 2, 1910, to return the same to the property owners, who had paid it. This attempt the plaintiffs objected to, and this threatened disbursement presents the question in controversy. At the time the two last-mentioned resolutions were adopted, the plaintiffs were the owners of all bonds due on September 15, 1910, and all subsequent installments of bonds and interest coupons, and no further payments, either of interest or principal, were due out of said special assessment fund until September 15, 1911.

Plaintiffs contend that the special assessment fund is a trust fund dedicated, pledged, and appropriated by statute to the payment of the bonds and interest, and can be used for no other purpose and cannot lawfully be diverted from said purpose, and that the city of El Reno, as a municipal corporation, has no right or interest therein, except as trustee, or stakeholder, and no power to use or expend the same except as such trustee for the payment of the bonds and interest thereon as provided by law, and they cite Sess. Laws 1907-08, p. 175 (Comp. Laws 1909, sec. 727; Rev. Laws 1910, sec. 642), a portion of which reads as follows:

“ * * * And the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purpose.”

That such money, when collected from the various property owners, becomes a trust fund, to be used only for the particular purpose for which it was raised, and especially until all bonds and interest and other legal charges against said fund have been paid, there can be no doubt. See *City of El Reno v. Cleveland Trinidad Paving Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; *Ritterbusch, Co. Treas., v. Havinghorst, City Treas.*, 29 Okla. 478, 118 Pac. 138; *Shultz v. Ritterbusch*, 38

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Okla. 478, 134 Pac. 961. But, conceding this to be true, it does not necessarily follow that the sums in question are clothed with that characteristic. The whole scheme of the statute is to raise only such sum as will pay the actual expense of the improvement. It was not designed to create a surplus at any time in this fund or any of its installments. Each year's assessment is intended to take care of one installment of principal and interest and no more. To be sure, this sum cannot be limited to an exact amount. From the nature of the business there will always be a slight discrepancy, amounting, perhaps, to a few dollars, or possibly a few hundred dollars, but the assessments for this purpose are made to bear 7 per cent. interest, while the bonds bear only 6 per cent., and this additional 1 per cent. ought, and in all probability will, always provide more than the necessary amount to meet any possible deficiency. Each lot and parcel of land in the proposed improvement district must bear its equal share in the total cost. It is not required to bear more. Neither the city nor the bondholder can require any property owner to pay one penny more than the sum legally assessed against his property. If A. owns property in the district, he must pay all the assessments levied against his property, and if, for any reason, he fails, neglects, or refuses to do so, the statute imposes a penalty of 18 per cent. per annum on the amount of his tax and also provides an easy and speedy method for selling the same for the purpose of compelling payment. But notwithstanding A. makes default in the payment of all or any part of his assessment, neither the city, nor the bondholder, nor any one else, can exact a single penny from B., who also owns property in the improvement district, for the purpose of making up A.'s deficiency. The statute provides ample remedy in such case, and A.'s property is pledged, by law, to the payment of his share in the cost of the improvement. So, also, if for any reason A. is required to or has paid into said fund more tax than he owes, or than has been legally levied against his property, the surplus belongs to him, and not to the municipality, the district, or the bondholder. These principles are so fundamental and so simple that there ought not to be any difference, in the minds of reasonable men, concerning them.

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The sums in controversy in this case are made up of money exacted, innocently to be sure, from the property owners in improvement district No. 2, in the city of El Reno. This money was collected and taken from them without any returning consideration. They received no paving for it. It was an excess amount collected as it was under color of law, but by reason of a miscalculation, a mistake, nothing more. The first and second installments of the special assessment had already been paid when this amount was returned to the city by the contractor, who had been overpaid, and all subsequent installments have been amply provided for by law. These sums, therefore, are not part of the trust fund created by statute and do not possess any such characteristic. If it were necessary, in order to pay bonds or interest, that this sum be retained, it would present a different question; but such is not the case. In equity these sums should be prorated among the property owners of said district. They belong to them and to no one else. No one has any lien thereon, nor have plaintiffs any interest therein direct or remote. They will not be injured by the return of this money to the property owners, for, no matter how long a period of time the installments extend over, this money would never be used to pay either bonds or interest; other, and ample, provision has been made to meet all these obligations of the improvement district, and if these sums are retained by the city treasurer, at the time of the final payment of the last series of bonds, it will still remain in his hands unused and wholly unnecessary for the purpose which plaintiffs contend for it. Plaintiffs, as holders of the bonds, have no greater rights than those given them by statute. The method of payment of the installments was provided by statute long before the issuance of the bonds, and the statute became and is yet a part of the contract. No attempt is being made by the property owners, the city or any one else, to vary, alter, change, or modify in any wise the statutory method of payment, and until such attempt is made they ought not complain. It must not be forgotten, in this connection, that at the time this suit was commenced all bonds and interest due had been fully paid; no other payment would be due until Septem-

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ber 15, 1911; until this 1911 assessment was collected there was nothing in the hands of the city treasurer in which plaintiffs would have any interest. If the sums in controversy were derived from a payment of assessment of which the installment of bonds and interest had not been paid, then plaintiffs undoubtedly would have an interest therein; but, as has been seen, such is not the case.

As has well been said by counsel for defendants in error:

"Under every contingency which may arise, provision is made in the statute for the payment of every bond and every coupon out of assessments due in the same year the bonds and coupons are due, and plaintiffs can have a vested interest in no other moneys. Plaintiffs have not shown that they will suffer any injury. What injury can they suffer? Their bonds and coupons due have been paid; ample provision is made in the law for the payment of bonds and coupons due in the future. They can be injured in no other way than by the loss of the amount invested in the bonds. Plaintiffs cannot come into court and demand equitable relief for the mere purpose of increasing the speculative value of their bonds. They cannot claim more security than the law gives them. How can they be injured by the distribution of money against which they have no claim, money which can never be theirs, money which no one owes to them in any way whatever? They purchased these bonds having in contemplation no other security than that provided by law, viz., the special assessments against the property abutting along the improvement. How, then, can they be injured by any act which in no way diminishes or affects this security? They purchased these bonds contemplating that only the money in the amount of the assessments would each year be placed in this fund, with which, each year, one-tenth of the bonds and the interest would be paid. How can they be injured by any disposition of money derived from some other source? The distribution of this \$14,549.77 in no way lessens the amounts to be paid upon the assessments. These have been paid in and will be paid in and used to redeem one-tenth of the bonds and the interest each year, in the manner and amounts provided by law, and as was contemplated by the parties at the time the bonds were purchased by plaintiff. The plaintiffs have and will continue to have, irrespective of what is done with this \$14,549.77, everything which the law provides they should have. What interest, then, can they claim in anything more, and what irreparable injury can they

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suffer from the disposition of something else? How can they suffer from the loss of something they have never had?"

The question as to the right of the city, as a municipality, to these sums, is not properly before us; but it might not be amiss to say that in our opinion it belongs, in equity at least, to these property owners who, under the color of law, were compelled to pay it, and not to the city. The city is the agent of both the property owners and the paving company in the transaction, and in this particular respect occupies the position of stakeholder. Until the bonds and interest have been fully paid, it can have no interest in any part of the special assessment fund, and then only such interest as may be given by statute, and at the time this suit was filed there was no statute dealing with the subject; but in these particular sums we do not see how it can possess any interest whatever.

This, therefore, brings us to the real question in this case: Did the lower court err in dissolving the temporary injunction and in refusing to grant perpetual injunction? Obviously not. For the reasons hereinabove set out, it appears that plaintiffs have a full, complete, and adequate remedy at law for any injury they may suffer by reason of the wrongful acts or omissions of the city to properly provide an ample fund to care for all outstanding bonds and interest. All payments have been made as contemplated by statute. No apprehension or fear that future payments will not be made has been suggested by plaintiffs, and none could properly be made, for no presumption exists that public officers will ignore the plain provisions of statute or refuse to perform their official duty. Plaintiffs have not shown, nor can they show, that they have been in any wise injured, or that they are likely to be injured, by the threatened disbursement of these sums. The law does not contemplate any duty on the part of the city, outside of statutory provisions, looking to the speculative enhancement of the market value of these bonds. Besides, this question was submitted to the court as a fact and resolved against the contentions of plaintiffs, and we have heard of no sufficient reason to warrant an interference with the judgment.

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From a careful analysis of the whole case, after due consideration of plaintiffs' claims, we cannot see where the lower court erred in its judgment. It therefore becomes unnecessary to give consideration to the other questions raised collaterally, in the briefs of the parties.

For the reasons given, the judgment of the district court of Canadian county should be affirmed.

By the Court: It is so ordered.

JOHNSTON v. MARSEE.

No. 3562. Opinion Filed February 10, 1914.

APPEAL AND ERROR—Failure to File Brief—Dismissal. Syllabus the same as in case of *Terry v. Coker*, ante, 138 Pac. 814.

(Syllabus by Brewer, C.)

Error from County Court, Cleveland County;

F. B. Swank, Judge.

Action between G. P. Johnston and J. G. Marsee. From the judgment, Johnston brings error. Dismissed.

Hutchin & Burks, for plaintiff in error.

Ben F. Williams, Jr., for defendant in error.

Opinion by BREWER, C. The petition in error and transcript of the record in this case were filed in this court February 1, 1912. The plaintiff in error has failed to file any brief in the cause, as required by rule 7 of this court (38 Okla. vi). The petition in error shall therefore be dismissed for want of prosecution. *Hass et al. v. McCampbell*, 27 Okla. 290, 111 Pac. 543; *Maddin v. McCormick et al.*, 27 Okla. 778, 117 Pac. 200, and cases cited; *Terry v. Coker*, ante, 138 Pac. 814.

By the Court: It is so ordered.

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COLONIAL TRUST & SAVINGS CO. v. BUNNEY.

No. 3294. Opinion Filed February 17, 1914.

*Error from District Court, Payne County;
A. H. Huston, Judge.*

Action by the Colonial Trust & Savings Company against William Bunney on a promissory note. Judgment for defendant, and plaintiff brings error. Dismissed.

Chester A. Lowrey, for plaintiff in error.

Opinion by HARRISON, C. This was an action by the Colonial Trust & Savings Company against William Bunney on a promissory note for the sum of \$2,474.10, and interest at 6 per cent. per annum, less a credit of \$25. The cause was tried in May, 1911, and verdict and judgment rendered in favor of defendant, from which judgment plaintiff appeals. The petition in error and case-made was filed in this court November 14, 1911, and submitted for decision September 15, 1913. There being no briefs by either party, the appeal should be dismissed, and the judgment of the court below affirmed.

By the Court: It is so ordered.

FLINT v. LONSDALE.

No. 2883. Opinion Filed November 25, 1913.

Rehearing Denied February 17, 1914.

(139 Pac. 268.)

1. **FALSE IMPRISONMENT—Judicial Officer—Liability for Official Acts—Damages.** A judicial officer will not be held liable in a civil action for false imprisonment for an erroneous exercise of judicial power, nor for acting in excess of his jurisdiction, where he has jurisdiction over the person and subject-matter, where he has not acted maliciously and corruptly.

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2. **SAME—Liability of Justices of the Peace.** A justice of the peace or judge of an inferior court is no more liable in an action for damages for false imprisonment, where he has acted erroneously, though in good faith, in determining some issue before him, or where he has acted in mere excess of jurisdiction, than are judges of superior courts.

(Syllabus by Harrison, C.)

Error from District Court, Creek County;

D. A. McDougal, Special Judge.

Action by E. F. Lonsdale against J. L. Flint and others, for false imprisonment. Judgment for plaintiff against defendant Flint, and Flint brings error. Reversed.

Wm. Cheatham, for plaintiff in error.

S. H. Sornberger, for defendant in error.

Opinion by HARRISON, C. This action was begun in the district court of Creek county, March, 1910, by E. F. Lonsdale against J. L. Flint, as justice of the peace, and W. N. Ellis, as sheriff, and J. O. Hereford and H. C. King, as deputies, for an alleged false imprisonment. The defendant, J. L. Flint, as justice of the peace, had imposed a jail sentence of ten days and fine of \$50 upon Lonsdale for an act of contempt committed in the court's presence in open court. The defendant peace officers executed the commitment. Upon application for writ of *habeas corpus* Lonsdale was discharged, on the grounds that the penalty imposed was beyond the jurisdiction of the justice, the fine imposed being \$50, while the statutes, section 6471, Comp. Laws 1909, limit the amount of fine which may be imposed by a justice of the peace for contempt to \$20. After being discharged in the *habeas corpus* proceedings plaintiff brought this action. The cause was tried in May, 1911, resulting in a discharge of the defendant peace officers and a verdict and judgment against the justice of the peace, J. L. Flint, for \$250, and from such judgment the case comes here.

The material question involved is whether a judicial officer is liable in a civil action for damages for erroneous exercise of judicial power. In the case at bar the justice of the peace had

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jurisdiction over the subject-matter and over the person of the defendant in the contempt proceedings. Under sections 6470, 6471, 6472, Comp. Laws 1909, justices of the peace are given jurisdiction in certain contempt proceedings. The alleged acts of contempt took place in the presence of the court and while the court was in session. The court, therefore, had jurisdiction over the subject-matter and the person of the defendant. The real question involved is whether he should be held civilly liable for exceeding his authority in the fine imposed and for an error in judgment as to whether defendant was entitled to further hearing in the contempt proceedings. The line of authorities, therefore, which have held judges of inferior courts liable for acting where they had no jurisdiction, and where they have acted maliciously and corruptly, is not in point nor applicable to the issues involved in this case. The question as to whether or not the justice of the peace in the case at bar acted maliciously and corruptly was not made an issue in the trial of the cause, and it may be observed, in this connection, that most, if not all, of the decisions holding a justice of the peace liable in such cases, refer to the two terms "maliciously" and "corruptly" conjunctively. We have been unable to find a single decision which has held the court liable on the sole issue of malice, nor have we been able to find a case where a superior court was held liable for what the courts have been pleased to term "a mere excess of jurisdiction." That is, cases where they clearly had jurisdiction of the subject-matter and of the person of the defendant, but merely exceeded their limit of authority in imposing the fine or imprisonment, or acted erroneously in some other exercise of judicial powers, where no malice and corruption were made an issue. Formerly there was a disposition on the part of courts in some jurisdictions to be more severe with courts of inferior than with courts of superior jurisdiction in holding them liable for erroneous judicial acts, but in the case of *Thompson v. Jackson*, reported in 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92, the Supreme Court of Iowa, in a well-considered case involving this question, after quoting many authorities against the rule, concludes:

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"We might cite many other protests and criticisms by courts and text-writers condemning the rule, but it is not necessary to do so. The current of legal thought is that the distinction is unreasonable, unjust, illogical, and ought not to obtain."

The Iowa court reached this conclusion after having concluded that from the great weight of authorities and best-considered cases, judges of superior courts had been held to be not liable for an erroneous exercise of judicial powers, using the following language:

"It is a well-established general rule that judges of superior courts and courts of general jurisdiction, when acting within the scope of their jurisdiction, are not liable, however erroneous or wrongful their acts may be" (citing *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Cooley on Torts*, 472-474; *Bishop, Noncontract Law*, secs. 781-784).

The rule in *Bradley v. Fisher*, *supra*, is followed in *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80. Also in *Austin v. Frooman*, 128 N. Y. 230, 28 N. E. 477, 14 L. R. A. 138, a case identical in principle with the law, and very like the question of fact, in the case at bar, the same line of authorities is followed.

One of the latest and best-considered cases on the subject is the case of *Broom v. Douglass*, decided by the Supreme Court of Alabama in February, 1912, and reported in 175 Ala. 268, 57 South. 860, 44 L. R. A. (N. S.) 164, wherein the court makes an exhaustive review of the authorities on all the different phases of liability of judicial officers, saying:

"We deduce from approved authorities the following principles as pertinent to the present case:

"(1) 1. The judge of a court of superior or general jurisdiction is not liable for any judicial act in excess of his jurisdiction which involves a present or previous affirmative decision of the fact of his jurisdiction, even though such decision is wholly erroneous, provided there is not a clear absence of all jurisdiction. *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (leading case); *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

"2. The fact that such judge acts maliciously or corruptly in such cases does not render him liable. *Busteed v. Parsons*;

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Bradley v. Fisher, *supra*; 19 Cyc. 333; note to *Lacey v. Hendricks*, 137 Am. St. Rep. 47.

"(2) 3. *A fortiori*, the judge of a court of inferior or limited jurisdiction is liable when he acts without a general jurisdiction of the subject-matter, even though his act involves his decision, made in perfect good faith, that he has such jurisdiction.

"(3) 4. When such judge acts fully within his jurisdiction. *i. e.*, when he has jurisdiction of the subject-matter, and has also acquired jurisdiction of the person in the particular case, he is not liable, though he act both maliciously and corruptly. *Irion v. Lewis*, 56 Ala. 190; *Heard v. Harris*, 68 Ala. 43; *Coleman v. Roberts*, 113 Ala. 323, 21 South. 449, 36 L. R. A. 84, 59 Am. St. Rep. 111; *Woodruff v. Stewart*, 63 Ala. 206; *Lacey v. Hendricks*, 164 Ala. 280, 51 South. 157, 137 Am. St. Rep. 45.

"(4) 5. When such judge acts judicially with respect to a subject-matter of which he has a general jurisdiction, but in the particular case he has acquired no jurisdiction of the person affected, he is not liable if the act involves his present or previous affirmative decision that he has jurisdiction of such person and authority to proceed in the particular case, provided: (1) a colorable case has been presented to him which fairly calls for or permits the exercise of his judgment with respect thereto; and provided (2) he has determined in good faith, without malice or corruption, that the case presented calls for the exercise of his general jurisdiction. *Grove v. Van Duyn*, 44 N. J. Law. 654, 43 Am. Rep. 412 (leading case); *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Bell v. McKinney*, 63 Miss. 187; *Gardner v. Couch*, 137 Mich. 358, 100 N. W. 673 [101 N. W. 802], 109 Am. St. Rep. 684; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Landt v. Hills*, 19 Barb. (N. Y.) 283; *Ayers v. Russell*, 50 Hun. 282, 3 N. Y. Supp. 338; *Bocock v. Cochran*, 32 Hun (N. Y.) 523; *Harman v. Brotherson*, 1 Denio (N. Y.) 537; *Gillett v. Thiebold*, 9 Kan. 427.

"We, of course, do not affirm that all of these cases have elaborated the principle in precise terms. Some of them have, and others clearly illustrate its operation."

But aside from the decisions of other jurisdictions, our own court in *Combstock v. Eagleton*, 11 Okla. 487, 69 Pac. 955, in a

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case involving the same principle of law, held that a court is not amenable to a civil action for false imprisonment, although the judgment was erroneous, and in rendering such judgment he exceeds the jurisdiction of his court. This being a rule of this court, and being supported by such an array of authorities, were we so disposed, we would not feel authorized to depart from the rule. In the case at bar, when the defendant was brought before the court for contempt, committed some hours previous, and which consisted of boisterous talking, gestures and cursing in open court, and in striking the justice in the face with his fist when the justice undertook to remonstrate with him or to make him desist, and informed that he had been fined for contempt, the question whether he was entitled to further hearing was a question requiring the exercise of judicial powers, and, under the rule in the foregoing authorities, the court was not liable for the exercise of judicial powers on such issue, although his judgment may have been wholly erroneous. However, there was an issue as to whether he was granted a hearing in the contempt proceedings. Such issue was submitted to the jury, and the jury seemed to have found from the evidence that the defendant had not been given such hearing as the law requires. We are not undertaking to say whether or not the jury was wrong. They determined such issue from the evidence before them, and may have been correct; but, under the rule followed in the foregoing authorities, even this would not render the justice civilly liable, because, as stated above, the question of defendant's right to further hearing under the circumstances of the case was a question which required the justice to judicially decide; and, although he may have decided erroneously, the law will not hold him liable.

The judgment, therefore, is reversed.

By the Court: It is so ordered.

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SHAWNEE GAS & ELECTRIC CO. *et al.* v. MOTESEN-
BOCKER.

No. 1538. Opinion Filed July 22, 1913.

On Rehearing, February 28, 1914.

(138 Pac. 790.)

1. **DEATH—Action for Wrongful Death—Persons Entitled to Sue.** The action for wrongful death can only be brought by the parties designated in section 4611 and 4612, Wilson's Rev. & Ann. St. 1903 (sections 5281, 5282, Rev. Laws 1910; sections 5945, 5946, Comp. Laws 1909).
2. **SAME—Joinder of Parties.** Where no personal representative is appointed, and the deceased left no widow, all the next of kin must join in the action.
3. **SAME—"Next of Kin."** By the term "next of kin" is meant all who would have been entitled to share in the distribution of the personal property of the deceased.
4. **SAME.** Where the person for whose death suit is brought left neither widow nor children nor father surviving him, but left a mother and brothers and sisters, the brothers and sisters were next of kin within the meaning of the statute, and must be joined in the action.
5. **EVIDENCE—Declarations of Third Person—Hearsay.** In a joint action against an electric light company and a city for the wrongful death of a person caused by coming in contact with a charged guy wire, it was error to admit in evidence as against the light company a resolution of the city council reciting that the company was negligently permitting its wires to be in a dangerous condition, and instructing the city attorney to begin whatever proceedings against it he deemed necessary if it failed to place them in good condition after notice.
6. **NEGLIGENCE—Subsequent Repairs—Admission of Evidence.** Evidence of alterations or repairs subsequent to an accident or injury is not admissible for the purpose of showing negligence in the original construction, or to show a confession of negligence.
7. **PARENT AND CHILD—Loss of Services of Child—Damages.** In an action by a parent for the loss of the services of a minor child, the damage to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amounts necessarily expended in the treatment and care of the child, and the value of the parent's services while nursing the child; and the jury may consider that with age, growth, and experience the value of the child's services would increase, although they cannot consider that the child might, if not injured, engage in any particular calling.

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8. **DEATH—Right of Action for Wrongful Death—Statutes Confering—"Detriment."** Comp. Laws 1909, secs. 2881, 2882, providing that every person who suffers detriment from the unlawful act or omission of another may recover damages therefor, and that "detriment" is a loss or harm suffered in person or property, does not confer a right of action for wrongful death; that right depending alone on Wilson's Rev. & Ann. St. 1903, secs. 4611, 4612.
9. **SAME—Persons Entitled to Sue—Separate Action.** Wilson's Rev. & Ann. St. 1903, sec. 4611 (Comp. Laws 1909, sec. 5945; Rev. Laws 1910, sec. 5281), contemplates but one action, and the same death cannot be sued for in separate actions by the various individuals sustaining damage thereby.
10. **SAME—Constitutional Provision.** Const. art 23, sec. 7, providing that the right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, does not change the method of procedure in such cases.

(Syllabus by Rosser, C.)

Error from District Court, Pottawatomie County:

J. B. A. Robertson, Judge.

Action by Sarah E. Motesenbocker against the Shawnee Gas & Electric Company and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Shartel, Katon & Wells and *Edward Howell*, for plaintiff in error Shawnee Gas & Electric Co.

W. T. Williams and *H. H. Smith*, for defendant in error.

Opinion by ROSSER, C. This was an action by Sarah E. Motesenbocker, hereinafter referred to as plaintiff, against the Shawnee Gas & Electric Company and the city of Shawnee, hereinafter referred to as defendants, to recover for the death of her son, Willie Motesenbocker, caused by coming in contact with a guy wire charged with electricity.

An opinion was written in this case several months ago; but rehearing was granted, and this opinion is written to take the place of the former opinion.

The deceased left several brothers and sisters surviving him, who were not joined as plaintiffs in the action, and the first ground urged for reversal is that they should have been joined

as plaintiffs, and that the mother could not maintain the action in her own name. Defendants contend that the right of action was created by sections 4611 and 4612, Wilson's Rev. & Ann. St. (sections 5281, 5282, Rev. Laws 1910; sections 5945, 5946, Comp. Laws 1909), and that the procedure prescribed by those sections must be followed.

Section 4611 is as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 4612 is as follows:

"That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section four hundred and thirteen of this chapter, is or has been at the time of his death in any other state or territory, or when, being a resident of this territory, no personal representative is or has been appointed, the action provided in said section four hundred and thirteen may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

It is elementary learning that at common law no recovery could be had for wrongful death. *Bartlett v. C., R. I. & P. Ry. Co.*, 21 Okla. 415, 96 Pac. 468; *A., T. & S. F. Ry. Co. v. Brown*, 26 Kan. 443; *City of Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —, decided January 20, 1913. The right was first given in England by Lord Campbell's act, passed in 1846. In so enlightened a state as Virginia the right of recovery for wrongful death did not exist until 1871, when a statute was enacted creating the right. 2 Min. Inst. 406.

As the right to sue for wrongful death is the creature of the statute, it can only be exercised by those persons whom the statute authorizes. *City of Eureka v. Merrifield*, 53 Kan. 794,

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37 Pac. 113; *Barker v. Hannibal & St. J. R. Co.*, 91 Mo. 86, 14 S. W. 280; *Coover v. Moore*, 31 Mo. 574; *Clark v. K. C., St. L. & C. R. Co.*, 219 Mo. 524, 118 S. W. 40; *Harshman v. N. P. R. Co.*, 14 N. D. 69, 103 N. W. 412; *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733.

It will be observed that either the personal representative or the widow can bring the action in a representative capacity. When the action is brought by them, it inures to the benefit of all entitled to share. When brought by the personal representative, if deceased left a widow and children, they receive the entire recovery; if deceased left a widow, she receives the entire recovery; if there is neither widow nor children, the next of kin receive the amount recovered, and it is distributed among them in the same manner as personal property of the deceased. If the suit is brought by the widow, she and the children of the deceased take the entire recovery, and if no children she gets it all. No part of the recovery in a suit by a widow goes to the next of kin, unless they happen to come within the more specific designation of children. But if no personal representative is appointed, and there is no widow, then the statute does not give any other person the right to sue in a representative capacity. Where there is neither personal representative nor widow, the suit must be brought by the next of kin. The question, then, is whether the brothers and sisters of the deceased are his next of kin. As stated before, the statute provides that where there is no widow and no children the recovery inures to the next of kin, to be distributed in the same manner as personal property of the deceased. There is a clear implication that by the term "next of kin" is meant those entitled to share in the personal property of the deceased. The term has been so construed by the Supreme Court of Kansas. *A., T. & S. F. Ry. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603; *A., T. & S. F. Ry. Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205, 6 Ann. Cas. 191. See, also, *Pinkham v. Blair*, 57 N. H. 226; *Insurance Co. v. Hinman*, 34 Barb. (N. Y.) 410.

If the deceased had left personal property, the plaintiff would have inherited half of it, and his brothers and sisters the other half, under the law in force at the time of his death, and at the

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time the action was brought. Wilson's Rev. & Ann. St. sec. 6895, subds. 2, 3; *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220, 30 L. R. A. (N. S.) 920. Therefore they are next of kin, and should have been joined as parties to the action.

It is contended by the plaintiff that she is the only person who has sustained any loss by the death of her son, and should therefore take all the recovery, and for that reason no one should be joined with her as plaintiffs in the action. But the statute has declared otherwise, and, however illogical it may seem, the brothers and sisters get a portion of the recovery, if any, and must be parties to the suit. See *Harshman v. N. P. R. Co.*, 14 N. D. 69, 103 N. W. 412.

It has been contended that plaintiff may base her right of action on sections 2881, 2882, Comp. Laws 1909 (Rev. Laws 1910, secs. 2845, 2846), which are as follows:

"Sec. 2881. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

"Sec. 2882. Detriment is a loss or harm suffered in person or property."

This theory cannot be maintained. These sections are merely declaratory of the common law, and were not intended to confer a right of action for death independent of sections 4611 and 4612, Wilson's Rev. & Ann. St., above quoted. *Muskogee Electric Traction Co. v. Reed*, 40 Okla. —, 130 Pac. 157. The case of *Partee v. St. L. & S. F. R. Co.* (C. C. A.) 204 Fed. 970, arose in Oklahoma, and was appealed from the federal District Court for the Eastern district of that state. On appeal it was held by the Circuit Court of Appeals, in an opinion by Judge Sanborn, that the right of action for wrongful death is created by section 4611, Wilson's Rev. & Ann. St. (section 5945, Comp. Laws 1909; section 5281, Rev. Laws 1910), and that such actions are governed in all respects by that statute.

The statute contemplated only one action. No case has been cited or found in which it was held that the cause of action for wrongful death could be divided or damages for the same death could be sued for in separate actions by the various in-

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dividuals who had sustained damages thereby. The rule is the other way. *McBride v. Berman*, 79 Ark. 62, 94 S. W. 913; *St. L., Iron M. & S. R. Co. v. Needham*, 52 Fed. 371, 3 C. C. A. 129; *Clark v. Kansas City, St. L. & C. R. Co.*, 219 Mo. 524, 118 S. W. 40; *M., K. & T. R. Co. v. Foreman*, 174 Fed. 377, 98 C. C. A. 281; *San Antonio & A. P. R. Co. v. Mertink*, 101 Tex. 165, 105 S. W. 485; *East Line & Red River R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820; *H. & T. C. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98. The rule that only one action can be brought was applied to the statute of Illinois allowing recovery for death in mines. *Beard v. Skeldon*, 113 Ill. 584; *Willis Coal & Mining Co. v. Grizzell*, 198 Ill. 313, 65 N. E. 74.

The question as to whether, if part of the next of kin refuse to join as plaintiff, they can be joined as defendants is not decided. There are authorities holding that to be the proper procedure.

The effect of section 7 of article 23 of the Constitution upon the right of action in such cases is not presented or discussed in the briefs of parties in this case. It is not believed, however, that that section changes the method of procedure in such cases, and it is not necessary to discuss to what extent, if at all, it enlarges the rights of the plaintiff in this action.

The plaintiff, over the objection of the defendants, introduced in evidence a resolution of the city council of the defendant city of Shawnee, passed May 11, 1908, which is as follows:

"Whereas, the franchise granting to the Shawnee Gas & Electric Company provides that said company shall keep its electric wires in a safe condition so as to protect life and property of the citizens of Shawnee, and whereas, the said company is continuously violating the provisions of the said franchise in this, that it negligently and carelessly maintains said electric wires running over the streets, alleys, and other public places of said city, said wires are suspended in such a careless and negligent manner that they are continually breaking when charged with a large voltage of electric current, thereby endangering the lives and property of the citizens of the city of Shawnee to such an extent that said wires have become dangerous and a nuisance, and several persons have already been injured or killed by said wires becoming broken or detached, and coming in contact with

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such persons while traveling along the streets of the city: Therefore, be it resolved, that said Gas & Electric Company is hereby notified to immediately place all electric wires in a good and safe condition so as to protect life and property, and that, in case it fails to do so within a reasonable time, the city attorney is hereby instructed to commence such proceedings as he may deem legal and necessary to annul the franchise of said Gas & Electric Company, and that a committee of three councilmen be appointed by the mayor to appear before the officers of said Gas & Electric Company, present this resolution, and demand that the said wires be placed in a safe condition."

The admission of this resolution is assigned as error. It was not admissible against the defendant the Shawnee Gas & Electric Company for any purpose, and if admissible as against the city (a question which is not decided) the jury should have been carefully and fully instructed that it was not to be considered by them as against the Gas & Electric Company. It amounted to a statement that the defendant Gas & Electric Company was guilty of negligence. It was hearsay purely; but coming in the form it did, it must have been prejudicial. *Selleck v. Janesville*, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892. The recitation in the resolution that the Gas & Electric Company was guilty of negligence undoubtedly influenced the jury. A statement made out of court is never admissible, except as an admission or confession, or for the purposes of contradiction, or in some cases to show motive or state of mind, and except dying declarations. This resolution was neither. It was error to admit it as against the Gas & Electric Company. See *Metropolitan Life Ins. Co. v. Anderson*, 79 Md. 375, 29 Atl. 606; *Brady v. North Jersey St. Ry. Co.*, 76 N. J. Law, 744, 71 Atl. 238; *Poling v. San Antonio & A. P. R. Co.*, 32 Tex. Civ. App. 487, 75 S. W. 69; *I. & G. N. R. Co. v. Diamond Roller Mills*, 36 Tex. Civ. App. 590, 82 S. W. 660; *Richardson v. Evans*, 5 Okla. 803, 50 Pac. 85.

The statement of the law by Commissioner Harrison, in his former opinion, as to the other questions presented, is adopted, and is as follows:

"Plaintiff was permitted to show during the trial that subsequent to the accident which caused her son's death the defend-

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ant Shawnee Gas & Electric Company proceeded to improve the safety of its system by changing the wires and putting in different insulators in the guy wires. The effect of this testimony was to show a confession of negligence on the part of the Electric Company. Under the doctrine announced in *M., K. & T. Ry. Co. v. Johnson*, 34 Okla. 582, 126 Pac. 567, this was error. In that case this court said: 'The rule is well established that evidence of repairs or alterations subsequent to an accident or injury is not admissible to show faulty or negligent original construction of the instrumentalities in use at the time of the injury'—further quoting with approval from Cyc., and numerous other authorities sustaining the doctrine.

"Also, under the rule announced as to the measure of damages in cases of this character, in *M., K. & T. Ry. Co. v. Horton*, 28 Okla. 815 [119 Pac. 233], the instructions of the court below were erroneous as to the elements of damage which might be included in the estimate. In the case *supra* the damages recoverable by a parent for the loss of a minor child are limited to the following elements: 'In the action by a parent for the loss of the services of his minor child, the damage to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amounts necessarily expended in the treatment and care of the child, and the value of the parent's services while nursing the child, and the jury may consider that with age, growth, and experience the value of the child's services would increase, although they cannot consider that the child might, if not injured, engage in any particular calling.' In paragraph 18, the court below instructed the jury as follows: 'And you are further instructed that, in your consideration of the detriment or loss suffered by the plaintiff because of the death of her son Willie Motesenbocker, you may take into such consideration the loss of the comfort, society, and protection which you may find from the evidence the said Willie Motesenbocker would have been to his mother, had he lived, during the remainder of his life, taking into consideration the age, health, and strength, and financial condition of his mother, the plaintiff, and his character, disposition, and affection, and degree of interest in his mother, in determining the compensation you will allow the plaintiff for all the detriment or losses suffered by her because of the death of her son Willie Motesenbocker. But in no case shall your verdict be more than \$15,000.' Obviously this instruction goes beyond the limitations fixed by *M., K. & T. Ry. Co. v. Horton*, *supra*."

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The judgment should, therefore, be reversed, and the cause remanded.

By the Court: It is so ordered.

ON REHEARING.

PER CURIAM. Upon consideration of the second petition for rehearing, we are constrained to adhere to the opinion of Commissioner Rosser filed herein, except as to the rule therein announced for the measure of damages for wrongful death of a child, as set out in paragraph 7 of the syllabus. The rule there announced is possibly correct as applied to the record in the instant case, but is too restricted for general application. In a case where the evidence shows the dependent condition of the surviving parent, and the disposition of the child, and its relation to the parent to be such that there is a reasonable expectation that the child would continue, after its majority, to contribute to the support of the parent, these facts should not be excluded from the jury in determining the damages sustained by the wrongful death.

With the modification, the former opinion is adhered to, and a rehearing denied.

By the Court: It is so ordered.

ATCHISON, T. & S. F. RY. CO. v. ELDRIDGE.

No. 2323. Opinion Filed February 28, 1914.

(139 Pac. 254.)

1. **WATERS AND WATER COURSES—Railroads—Damages from Overflow—Instructions.** Where the basis of a cause of action against a railway company is for damages resulting from an overflow caused by the defective construction of embankments, in that no adequate openings were left for the escape of water through its natural channels, a judgment will not be reversed because of a specific instruction as to the defective construction of a bridge over the water course along the line of railroad, although no specific complaint was made of the construction of the bridge in the pleadings, where such instruction has reference to no other defect, except to the inadequacy of the open way through such embankment for the flow of water.
2. **APPEAL AND ERROR—Verdict—Evidence.** Where the law applicable to the facts material to the issues joined by the pleadings in an action is fairly and fully submitted to the jury by the court, a verdict of a jury based upon conflicting testimony will not be disturbed if it is reasonably supported by the testimony in the case.
3. **EMINENT DOMAIN—Recovery of Damages—Conclusiveness.** The fact that a railroad company acquired a right of way by act of Congress prior to statehood, under the terms of which the land covered by such right of way was appraised and the damages arising from the ordinary inconveniences resulting from a railroad running across one's land were assessed, does not grant to such railroad company an absolute immunity forever against damages resulting to abutting land-owners from a negligent construction of railroad embankments across waterways.
4. **LIMITATION OF ACTIONS—Damages from Overflow—Railroad Embankment.** An action against a railroad company for damages resulting from an overflow caused by the defective construction of the railroad embankments is not barred by limitation because such embankments have been constructed more than two years prior to the injury, but the time in which such action may be brought dates from the time the injuries are received and damages sustained.

(Syllabus by Harrison, C.)

Error from District Court, Noble County;
W. M. Bowles, Judge.

Atehison, T. & S. F. Ry. Co. v. Eldridge.

Action by J. W. Eldridge against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cottingham & Bledsoe, John Devereux, and George M. Green, for plaintiff in error.

Henry S. Johnston, for defendant in error.

Opinion by HARRISON, C. This was an action by J. W. Eldridge against the A., T. & S. F. Ry. Co. for damages alleged to have been sustained by reason of an overflow caused by the negligent construction of defendant's railway in throwing up its embankments in such manner as to cause the water from a certain stream or creek and its tributaries to dam up and flow back over and upon defendant's corn crop, to his damage in the sum of \$1,969; the specific negligence alleged and relied upon being that the railroad company in constructing its road through Red Rock creek valley crossed said creek and some of its tributaries, traversing a considerable section of country drained by same, and that its embankments, through such section of country and across such tributaries and creeks, were so constructed as not to allow the water of such creeks or the rainfall upon the country drained by such creeks and tributaries, after it had found its way into such creeks, to escape through its natural channels, but caused it to back up and overflow plaintiff's land as aforesaid. The cause was tried at the April term of the district court of Noble county, 1910, resulting in a verdict and judgment against the railroad company for \$952 and costs of action. From such judgment the railway company appeals upon sixteen assignments of error.

These assignments are grouped and presented by plaintiff in error under three heads: First, errors in the instructions to the jury; second, the verdict is contrary to law and the evidence in the case; third, that the court erred in not giving an instructed verdict in favor of the railway company, and in not holding that the action was barred by the statute of limitations.

Under the first group of errors assigned, the alleged errors in the court's instructions were urged, but from an examination

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of the issues made by the pleadings and the testimony admitted in support of such issues, we find no error in this regard. The instructions, upon the whole, seem altogether fair to plaintiff in error, and to have fully and fairly covered the law applicable to the facts involved. The specific objections urged, however, are that the court instructed the jury in reference to a certain bridge across one of the streams alleged to have been affected by the railway's embankments, and that such instruction was erroneous because at variance with the issues made by the pleadings; and, further, that the court erred in instructing the jury as to surface water, because the issue as to whether such bridge was defectively constructed or not, and the issue as to whether or not the flow of surface water was obstructed by the railway's embankments, were not raised by the pleadings—citing a list of authorities against instructions on issues not made by the pleadings. We find no objection to the principles of law enunciated by the authorities cited, but from a study of the primary issues involved and the testimony in support thereof, and the instructions of the court in reference thereto, it is apparent that the authorities cited have no application to the case at bar. It is true that the plaintiff's petition made no specific reference to the construction of the bridge in question, or to any bridge, but it did specifically complain that the railway company so constructed its embankments through the creek valley and across the creek's tributaries in question as to obstruct the flow of water through its natural channels by not leaving sufficient openings to allow the waters of such streams to escape. The basis of plaintiff's cause of action was that the railway had so constructed its embankments as to obstruct the flow of water from the district drained by the creeks in question by not leaving sufficient openings in the embankments for the water to escape through its natural channels. This was denied by the railway company, and the issues thus formed as to whether the water was obstructed as alleged. It mattered not, therefore, whether such obstruction be caused by an inadequate openway through a bridge, culvert, conduit, or what not, and the court's instructions in reference to the bridge had no other meaning in reference thereto, except

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as to whether it was so constructed as to obstruct the flow of channel water, and we are unable to see wherein the court's instructions, either in reference to the bridge or the surface water, could have materially prejudiced the legal rights of the defendant company. The instruction complained of was more in defendant's favor than a strict adherence to the doctrine on surface water announced in *C., R. I. & P. Ry. Co. v. Groves*, 20 Okla. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802, would permit. At any rate, we can see no error to plaintiff's prejudice in this instruction. The contention that it was error because given on an issue not made by the pleadings is without merit.

Under the second group it is contended that the verdict is contrary to law and not supported by sufficient evidence. As to the first proposition presented in this group, we think the law applicable to the facts in the case was given to the jury with substantial correctness and fairness to defendant, and that the verdict was clearly in accord with the court's instructions. As to the second proposition, we think the verdict was fairly supported by the evidence, and find no reversible error in this regard.

Under the third group is presented the fourteenth and sixteenth assignments of error, which complain of the court's refusal to give a peremptory instruction in favor of defendant, and of its refusal to hold that plaintiff's cause of action was barred by the statute of limitations.

The contention that the court erred in refusing a peremptory instruction in favor of the defendant is based upon the assumption that the railway company acquired its right of way by act of Congress prior to statehood, and that by such act all damages done to the land over which such railway was built were appraised and settled, and that the railway company's rights in the premises, that is, its rights to maintain and operate its line of railway, were fixed by act of Congress before the adoption of our Constitution, and that such rights were not changed by the adoption of the Constitution, but remained as they were before statehood—citing a number of our own court decisions in support of such contention. The doctrine that existing rights

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were not changed by the adoption of our Constitution is well settled, not only by the decisions of our court, but by the plain provisions of the Constitution itself, but the contention that the mere fact that a right of way was granted to the railway company by the act of Congress prior to statehood, and that the damages done to the land over which it was constructed were appraised and settled under the provisions of such act of Congress, gave the railway company forever thereafter absolute immunity against future negligent acts, is utterly untenable. It would be just as reasonable to argue that such act of Congress in appraising the damages done to the land over which it was constructed gave the railway company absolute immunity forever against negligently setting fire to the grass, meadows, or growing crops of abutting landowners, and against willfully and wantonly running over and killing their stock, as to argue that the appraisement of the value of the land required for a right of way and the assessment of damages for the ordinary inconvenience resulting from having a railway running across one's land, gave the company a fixed right of immunity forever against damages resulting from its negligent construction.

The contention that the action was barred by the statute of limitations is based upon the assumption that the embankments in question were constructed more than two years before the action was brought. This question was before this court in *St. L. & S. F. R. Co. v. Ramsey*, 37 Okla. 448, 132 Pac. 478, wherein the court said:

"The fourth contention, briefly stated, is that, inasmuch as the railroad was constructed more than two years prior to the bringing of this suit, and as the railroad and its embankment and ditches were permanent structures, therefore whatever damage was done was of a permanent nature, and occurred at the completion of the road, and that a right of action was therefore barred within two years from the negligent completion of the works. Under the facts of this case, this position is unsound. The facts bring it fairly within the rule announced by this court in the case of *City of Ardmore v. Orr* (decided January 21, 1913) [35 Okla. 305] 129 Pac. 867: The syllabus in that case is all that needs to be repeated. The case itself goes into the subject and its different phases with much care, and the rule

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announced is stated thus: 'For negligent injuries to realty which result from a cause susceptible of remedy or abatement, the owner is entitled to recover therefor only such damages as had accrued on account of the impaired or lost use of his property up to the time of the commencement of his action. For injuries resulting from permanent cause, the owner may recover in a single action his entire damages, to wit, that amount which represents the permanent depreciation of the realty in value in consequence of the injury. When a cause of an injury is abatable, either by an expenditure of labor or money, it will not be held permanent.' It follows that, when not permanent, the statute of limitation does not begin to run until the injury is suffered."

Aside from what is said in the foregoing opinion, it strikes us as unreasonable to argue that a cause of action is barred by limitation before it arises. The facts in the case at bar do not disclose that plaintiff ever sustained any damage prior to the overflow complained of, and if the embankment in question, be it ever so negligently constructed, had been maintained for a century, the plaintiff would have had no cause of action for damages sustained until they were sustained; hence his right of action necessarily dated from the date of his injuries.

From a study of the record no reversible error appears. The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

JENNINGS CO. v. DYER *et al.*

No. 2718. Opinion Filed February 28, 1914.

(139 Pac. 250.)

1. **APPEAL AND ERROR—Presentation for Review—Errors at Trial—Denial of New Trial.** Where plaintiff in error fails to assign as error in his petition in error the overruling of a motion for a new trial, no question which seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below is properly presented to this court, and such alleged errors cannot therefore be reviewed.

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2. **CONTINUANCE—Grounds.** Continuances of causes are not favored by the courts, and, when granted, the grounds must be such that the trial court may clearly see that a postponement of the case will result in the furtherance of justice. Such applications are addressed to the sound discretion of the court, and will not be reversed unless an abuse of discretion plainly appears.
3. **CONTINUANCE—Grounds—Sickness of President of Corporation.** An application for a continuance in behalf of a corporation litigant, which stated that its president was confined to his home in another county on account of illness, and was unable to travel, accompanied by attending physician's certificate to that effect, and where it further appears in said application that such president had the general management of the corporate business, and that the facts pertaining to the action were peculiarly within his knowledge, and that plaintiff could not safely go to trial without his presence, and unless the cause was continued the rights of plaintiff would be greatly injured and endangered, does not, for the reasons set forth in the opinion, state a valid ground for continuance as provided in section 5836, Comp. Laws 1909 (section 5045, Rev. Laws 1910).

(Syllabus by Sharp, C.)

Error from District Court, Carter County;
S. H. Russell, Judge.

Action by the Jennings Company against Mamie Dyer, Frank Dyer, Salina Dyer, Eliza Dyer, L. D. Akers, Jimmie Speake, and Dow Taylor, administrator of the estate of A. W. Speake, deceased. From a judgment in favor of defendant Mamie Dyer, plaintiff brings error. Affirmed.

Moore & Bass, for plaintiff in error.

Johnson & McGill and *Thos. Norman*, for defendants in error.

Opinion by SHARP, C. The errors assigned by plaintiff in error in its petition in error are as follows: (1) That the court erred in overruling plaintiff's motion for a continuance; (2) that the judgment is contrary both to the law and the evidence; (3) that the court erred in rendering judgment against plaintiff and in favor of defendant Mamie Dyer.

Motion for a new trial was filed and overruled, to which plaintiff excepted. The action of the court, however, in overruling the motion for a new trial has not been assigned as error in plaintiff in error's petition in error in this court, and, as all

the errors assigned are those occurring during the trial, none of the matters urged in its brief, unless it be the action of the court in overruling the plaintiff's motion for a continuance, can be considered; the rule in such cases being that where the errors assigned are those occurring during the trial, and appellant fails to assign as error the overruling of its motion for a new trial, in its petition in error, no question which seeks to review such errors is properly presented for review to this court. *Cox v. Lavine*, 29 Okla. 312, 116 Pac. 920; *Meyer v. James*, 29 Okla. 7, 115 Pac. 1016; *George v. Moore*, 32 Okla. 842, 124 Pac. 36; *Hunter v. Hines et al.*, 33 Okla. 590, 127 Pac. 386; *Butler v. Oklahoma State Bank*, 36 Okla. 611, 129 Pac. 750; *St. Louis, I. M. & S. Ry. Co. v. Dyer*, 36 Okla. 112, 128 Pac. 265.

Assuming, without deciding, that the action of the trial court in overruling plaintiff's application for continuance may be properly considered, in view of the state of the record, as shown, we are of the opinion that no error in that respect was committed. Plaintiff in error is a corporation, and it appears from the affidavit for continuance, made by its attorney, that B. E. Jennings, president of said company, was, on account of illness, confined to his home in Oklahoma City, and unable to travel or to attend to business, as shown by the physician's certificate. The affidavit further states that the said B. E. Jennings, as president of the plaintiff corporation, "has the general management of the business of plaintiff, and the facts pertaining to this suit are peculiarly within his knowledge; that plaintiff could not safely go to trial without his presence, and, unless said cause is continued, the rights and interests of this plaintiff will be greatly injured and endangered." The case of *McMahan v. Norick*, 12 Okla. 125, 69 Pac. 1047, is relied upon by plaintiff as authority requiring a reversal of the judgment of the trial court, on account of the denial of a continuance to plaintiff. In that case the application for a continuance was supported not only by an affidavit of the attending physician, but the affidavit set forth the facts to which the defendant would testify if present, and further showed that said facts could not be proven by any other witness, and that, if the case was continued until the next term

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of the court, the attendance of the defendant could be procured. The present affidavit contains none of the four provisions named. The statute (section 5836, Comp. Laws 1909; section 5045, Rev. Laws 1910) provides that a motion for a continuance, on account of the absence of evidence, can be had only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and that, if it is for an absent witness, the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts affiant believes the witness will prove, and that he believes them to be true. It is further provided that, if the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as a deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance on the ground of absence of such evidence shall be granted.

It is stated in the brief of counsel for plaintiff in error that the witness' presence was desired chiefly on the ground that, being a party to the suit, he had the right to be present at the trial, to assist counsel. It appears from the order of court, overruling plaintiff's application for a continuance, that a former continuance had been asked, and presumably granted, on account of the absence of one M. L. Alexander. At the trial, Alexander was present, and testified that he was the plaintiff's agent, and acquainted with the facts pertaining to the loan by plaintiff to defendants. While it is unquestionably an important privilege to a party to be present at the trial of his cause, which should not be denied upon a proper application made, unless for weighty reasons, yet where a party is represented by an agent, through whom the transaction in question was made, and who is familiar with the facts, and testifies fully concerning them, and it does not affirmatively appear that the absent party (or, in this case, officer of a corporation which is a party) was himself a witness, we do not think that an abuse of discretion was made to appear. It is said in 9 Cyc. 96, that the illness of a

party is not *ipso facto* a cause for continuance of the trial; but where the party's presence at the trial is indispensable and the character of his illness is such as to render his presence at the trial impossible, a continuance should be granted. On the preceding page, it is observed that the presence of a party to an action, to aid and assist counsel in the trial of a cause, is not ordinarily considered essential. The absence of a party, not as a witness, but simply as an aid to counsel, is rarely regarded as a ground for continuance. It must be made to appear that the presence of the absent party is indispensable to a fair trial of the cause, and that injustice may result to the applicant in the event of a refusal of a delay.

As already seen, a former continuance of the trial, on the application of the plaintiff, had been granted. Continuances of causes are not favored by the courts, and, when granted, the grounds alleged must be such that the court may clearly see that a postponement of the case will result in furtherance of justice. Such applications are addressed to the sound discretion of the court, and will not be reversed unless an abuse of discretion plainly appears. *McCann v. McCann et al.*, 24 Okla. 264, 103 Pac. 694; *Kelley et al. v. Wood*, 32 Okla. 104, 120 Pac. 1110; *Beard v. Mackey*, 51 Kan. 131, 32 Pac. 921; *Paulucci v. Verity et al.*, 1 Kan. App. 121, 40 Pac. 927.

It may be stated, as a general rule, that an affidavit for a continuance of a cause must conform to the provisions of the statute authorizing the granting of a continuance. In our opinion, no sufficient showing for a continuance was made to appear. On the other hand, the facts pertaining to the transaction being within the personal knowledge of plaintiff's agent, Alexander, who was present and testified fully concerning the subject-matter of the action, the application to continue the cause a second time was properly denied.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

BRADY *et al.* v. BANK OF COMMERCE OF COWETA *et al.*

No. 2818. Opinion Filed November 18, 1913.

Rehearing Denied February 28, 1914.

(138 Pac. 1020.)

1. **VENDOR AND PURCHASER—Contract of Sale—Implied Warranty—Marketable Title.** In the absence of an express provision indicating the character of the title provided for by a contract of sale of real property, the implication is that a good or marketable title in fee simple is intended in all executory contracts.
2. **SAME.** Such implied warranty only exists so long as the contract remains executory; i. e., until delivery of the deed.
3. **COVENANTS—Construction—Renewal Agreement—What Law Governs.** An executory contract for the sale of land in the Indian Territory was made in said territory July 29, 1907, which by its terms expired prior to November 16, 1907 (the day that Oklahoma was admitted into the Union as a State). The contract, a deed, and part payment were then placed in escrow, but nothing was done toward performing the conditions of the sale agreement until December 4, 1907, when a new contract, extending the time of performance, was signed by the parties. Within a short time thereafter, the deed and consideration therefor, including two certain notes, were delivered. **Held**, in an action to recover on said notes, where the makers set up as a defense broken covenants of warranty, that the covenants contained in the deed should be construed, and the purchaser's rights thereunder determined, by the law in force when the second contract was made and the deed delivered.
4. **SAME—Covenants of Seisin—"Good Right to Convey"—Breach.** Under section 1202, Comp. Laws 1909 (Rev. Laws 1910, sec. 1162), a warranty deed made in substantial compliance with the provisions of said act shall be deemed a covenant on the part of the grantor that at the time of making the deed he was legally seised of an indefeasible estate in fee simple of the premises and had a good right and full power to convey the same.
5. **SAME.** "Covenants of seisin" and "good right to convey" are synonymous and, if broken at all, are broken when made, and an actual eviction is unnecessary to consummate the breach.
6. **VENDOR AND PURCHASER—Foreclosure of Purchase-Money Mortgage—Defense—Breach of Covenants.** In such cases the purchaser in possession, in a suit to foreclose a mortgage given for the purchase money, may defend against a recovery thereon and set up broken covenants of seisin, provided the deed be such as contemplated by the statute above mentioned.

(Syllabus by Sharp, C.)

Brady et al. v. Bank of Commerce of Coweta et al.

*Error from District Court, Okmulgee County;
W. L. Barnum, Judge.*

Action by the Bank of Commerce of Coweta against A. C. Brady, Maude Brady, and R. E. Cook. From judgment for plaintiff and for defendant R. E. Cook, defendants A. C. Brady and Maude Brady bring error. Reversed and remanded.

Frank F. Lamb, for plaintiffs in error.

Owen & Stone, for defendants in error.

Opinion by SHARP, C. On July 29, 1907, the Coweta State Bank and defendant A. C. Brady entered into a written contract whereby the former agreed to sell the latter 160 acres of land lying in the Western district of the Indian Territory for \$2,400 on the following conditions:

"That the party of the second part will deposit with the Bank of Commerce of Coweta, Ind. T., five hundred dollars (500) as a part payment for said tract of land. Party of the first part agrees to place with said bank a warranty deed for the above-described land. The above deed and deposit is to be held by the Bank of Commerce of Coweta, Ind. T. Party of the first part agrees with the party of the second part to clear up the title of the aforesaid tract of land to the satisfaction of the party of the second part, or his attorney, and, when the title is acceptable, party of the second part agrees to place in the Bank of Commerce of Coweta, Ind. T., the balance of the purchase price of said land, \$1,900, to be turned over to the Coweta State Bank, and the Bank of Commerce is to turn the deed of the aforesaid described tract of land to the party of the second part: Provided, however, if the said party of the first part fails to clear up the title to the said tract of land within ninety days, the party of the second part may withdraw his money deposited with this contract, and if the party of the second part fails, at the expiration of ninety days, to fulfill this contract, the party of the first part may withdraw his deed from the said bank, and this contract shall be null and void."

Contemporaneous with the execution of this contract, the bank executed its deed, which, together with \$500 put up by Brady, was placed in escrow with the Bank of Commerce. The terms of the contract, other than the escrow agreement, not

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having been complied with by either party within the time named in the agreement, the parties thereto on December 4, 1907, entered into a second written agreement, which referred to the former contract and the respective deposits made with the depository, the Bank of Commerce. This latter agreement referred particularly to certain valuable improvements that the purchaser desired to place on the land, and provided a means whereby the amount and value thereof might be determined, provided either that the deed to the land was not perfected or that it was not delivered within a reasonable time. It was further agreed that the seller would make every effort to clear the title to the land, and for the depository to deliver the deed within 30 days therefrom if possible.

The deed deposited was a general warranty deed, containing no special covenants of warranty. On or about January 1, 1908, this deed was delivered to Brady, who in turn executed to the Coweta State Bank his note in the sum of \$1,000, due and payable three years from date, and further executed to the defendant R. E. Cook his note in the sum of \$900, due and payable two years after date. Both notes were secured by a mortgage on the land sold Brady by the bank. The makers of the notes having defaulted in the payment of interest, foreclosure suit was instituted by the then holder of said \$1,000 note, the Bank of Commerce, the depository named in the original escrow agreement. The defendant Cook filed a cross-petition and prayed judgment on his note and a foreclosure of the mortgage securing the same. Trial being had, personal judgment was rendered against the Bradys, and a decree of foreclosure entered.

Among other defenses pleaded by the defendants, the Bradys, was a failure of consideration, in that the title to the land attempted to be conveyed had wholly failed. The land was originally allotted to William Francis, a citizen by blood of the Creek Nation, who died April 6, 1905. The Coweta State Bank, it seems, obtained whatever title it may have had through a conveyance by one Mack Francis, represented to be the sole surviving heir at law of William Francis, deceased. It was further claimed, and there was evidence offered tending to show, that,

at the time the said Mack Francis conveyed said lands, he was not the sole surviving heir of his father, but instead one of three living children, and that, in addition thereto, said grantor was, on the date of his said conveyance, a minor under 21 years of age. All evidence tending to show these facts was excluded by the court, and the court's action therein is assigned as error.

The theory upon which the plaintiff and the defendant Cook proceeded was that, the Bradys neither having pleaded nor proved an eviction by title paramount, the makers of said notes could not defeat a recovery thereon, in an action by the assignee of the vendor; that, being in possession of the lands described in the deed, the covenant of warranty contained therein was not broken. Numerous Arkansas decisions are cited in support of this contention, among which are the following: *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Bird v. Smith*, 8 Ark. 369; *Walker v. Johnson*, 13 Ark. 524; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; *Thompson v. Brazile*, 65 Ark. 495, 47 S. W. 299.

Conceding the rule in that state to be that, if in a conveyance there be no covenant other than of warranty of title, a purchaser in possession has neither cause of action nor legal excuse to withhold payment until he has been evicted, in the absence of either fraud or misrepresentation affecting the title, or situation of the property amounting to fraud, we must first determine whether the Arkansas rule of decision in force in the Indian Territory prior to November 16, 1907, furnishes the law by which we are to determine the respective rights of the parties, and, if not, then we must ascertain what is the controlling law, for it must be admitted that the right of a purchaser through a general warranty deed, without special covenants of warranty, under the Arkansas law, differs materially from those rights that follow under the same form of deed under our statute.

We have been unable to find any authorities directly in point, but a close and careful study of the written contracts impels us to the belief that the parties thereto contemplated a good or marketable title in fee simple. But whether the contracts, interpreted in the light of the surrounding facts and of the law at

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the time in force, can be so construed, it is a very general rule that, in the absence of an express provision indicating the character of title provided for by a contract of sale of real property, the implication is that a good or marketable title in fee simple is intended in all executory contracts. *Yeates et al. v. Pryor*, 11 Ark. 58; *Witter v. Biscoc*, 13 Ark. 422; *Vaughan v. Butterfield*, 85 Ark. 289, 107 S. W. 993, 122 Am. St. Rep. 31; *Durham v. Hadley*, 47 Kan. 73, 27 Pac. 105; *McPherson et al. v. Kissee*, 239 Mo. 664, 144 S. W. 410; *Fought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Meyer v. Madreperla*, 68 N. J. Law, 258, 53 Atl. 477, 96 Am. St. Rep. 536; 39 Cyc. 1442.

With regard to deeds, where the title passes by delivery, it is provided by section 1214, Comp. Laws 1909 (Rev. Laws 1910, sec. 1175):

“Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words.”

The original contract, on the advent of statehood, had not been complied with by either party, but on the other hand remained dormant. At that time either was free to be relieved of its terms; the seller by recalling his deed, the purchaser by withdrawing his deposit. But neither had elected so to do, and on the 4th day of December following they entered into a new agreement, executed with all the formalities of the original, but which referred to the deposits theretofore made under the old contract. Under this latter agreement the seller obligated itself to perfect the deed within a reasonable time, and to clear up the title to the land, and “have Bank of Commerce deliver title within 30 days, if possible.” The record does not show that anything had been done on the date of the contract toward perfecting the seller's title to the land. The deed remaining in escrow, and the conditions of the escrow agreement not having been complied with, no title had passed to the purchaser. Comp. Laws 1909, secs. 1091, 1092 (Rev. Laws 1910, sec. 943).

While the contract of July 29, 1907, required only that the bank deposit a warranty deed, it was further provided that said

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bank was to clear up the title to the satisfaction of the purchaser or his attorney, obviously meaning that the warranty deed contemplated by the parties was to be executed, either when the title was cleared up, or was to be such as would fully protect the purchaser against the existing defects that rendered the close of the transaction, at the time, impracticable. While the Arkansas laws were in force, the purchaser did not accept the deed, but after the execution of the new agreement, and when the present laws, which we have seen more fully protected the purchaser, became effective, the deed was accepted and the cash paid and the notes executed and delivered. The undertaking as renewed was to furnish a warranty deed. The second contract being made, and the deed delivered and accepted while the Oklahoma laws were in force, it will be presumed, in the absence of proof to the contrary, that the parties contracted with reference to the laws in force at the time. The rule is general that the laws, in existence when a contract in regard to real estate is made, enter into and become a part of such contract. *Simpson et al. v. Hillis*, 30 Okla. 561, 120 Pac. 572, Ann. Cas. 1913C, 227; *Phinney v. Phinney*, 81 Me. 450, 17 Atl. 405, 4 L. R. A. 348, 10 Am. St. Rep. 266; *Brine v. Hartford Fire Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858. At the time of the renewal of the contract, the laws in force when negotiations were begun had become obsolete, and, if such laws were to control, an express provision to that effect should have been incorporated in the second contract, or by express words the title should have been limited in the deed. Under the original contract, only the deposits with the depository had been made. Not having been performed within the time named or within a reasonable time thereafter, by the efflux of time either party could have withdrawn from its terms without incurring, so far as the record discloses, any liability. By the subsequent agreement, the purchaser went into possession and erected on the lands improvements of the alleged value of \$2,000, so that what was done toward a carrying out of the conditions named in the escrow agreement was done under the renewed or second agreement, extending the time of performance. Our conclusion, therefore, is that the laws of Oklahoma, and not of Arkansas, must govern.

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Under section 1202, Comp. Laws 1909 (section 1162, Rev. Laws 1910), it is provided:

"A warranty deed made in substantial compliance with the provisions of this chapter shall convey to the grantee, his heirs or assigns, the whole interest of the grantor in the premises described, and shall be deemed a covenant on the part of the grantor that at the time of making the deed he is legally seised of an indefeasible estate in fee simple of the premises and has good right and full power to convey the same; that the same is clear of all incumbrances and liens, and that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession thereof, and will defend the title thereto against all persons who may lawfully claim the same; and the covenants and warranty shall be obligatory and binding upon any such grantor, his heirs and personal representatives, as if written at length in such deed."

In *Faller v. Davis et al.*, 30 Okla. 56, 118 Pac. 382, Ann. Cas. 1913B, 1181 (cited in *Joiner v. Ardmore Loan & Trust Co.*, 33 Okla. 266, 124 Pac. 1073), it was held that covenants of seisin and good right to convey were synonymous, and if broken at all were broken when made, and an actual eviction was unnecessary to consummate the breach. The rule there announced is one that obtains in the great majority of American jurisdictions, where covenants of seisin and of good right to convey are considered as covenants *in praesenti* and broken, if at all, as soon as made, if the convenantor is not legally seised of the property sought to be conveyed. An extended note to the above case reviews at length the authorities, both in this country and in England and Canada, rendering unnecessary any further discussion of the question.

The deed through which defendants claim title meets fully the requirements of the statute then in force. If, therefore, the Coweta State Bank was not legally seised of an indefeasible estate in fee simple of the lands and did not have a good right and full power to convey the same, the implied covenant of seisin attaching under the statute was broken, and the purchasers, in a suit on the notes, had the right, as a defense thereto, to plead

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a failure of consideration, without an eviction from the premises. Upon the vendor's title must ultimately rest the right to recover on these notes.

The case, we think, was decided upon a mistaken notion as to the applicatory law, and for that reason the judgment of the trial court should be reversed, and the cause remanded for a new trial.

By the Court: It is so ordered.

NAVARRE *et ux.* v. HONEA *et al.*

No. 2856. Opinion Filed February 28, 1914.

(139 Pac. 310.)

1. **EVIDENCE—Documentary Evidence—Daybook.** Where, in a mercantile business, the usual course is for each salesman, at the time of the sale, to make a memorandum thereof in the form of a "credit ticket," with carbon copy then delivered to the purchaser, and, at the end of each day, to deliver to the bookkeeper the original of such ticket, from which, on the same or next following day, the bookkeeper correctly, and in the usual course of said business, enters same in a daybook, such daybook is admissible in evidence, upon the testimony of the bookkeeper alone to the facts hereinbefore recited, under section 4277, St. Okla. 1893 (section 4574, Wilson's Rev. & Ann. St. 1903; section 5907, Comp. Laws 1909; section 5114, Rev. Laws 1910), if such daybook is a book of original entry.
2. **SAME—"Books of Original Entry".** Books of account, consisting of entries made at or near the time of the transactions to which they relate, and made directly from reports of salesmen in the form of written memoranda not compiled or preserved in book form nor otherwise in respect to convenience similarly available, are books of original entry.
3. **SAME—Books of Account—Probative Effect.** A book of account, when admissible in evidence, even though free from inherent improbability, is only presumptive and disputable evidence of the correctness of the entries therein appearing.

(Syllabus by Thacker, C.)

Error from County Court, Oklahoma County;

Sam Hooker, Judge.

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Action by John W. Honea and Travis Williams against Louis M. Navarre and Julia Navarre, on account. Judgment for plaintiffs, and defendants bring error. Affirmed.

Winn & Brill, for plaintiffs in error.

A. J. Carlton and *Embry & Hastings*, for defendants in error.

Opinion by THACKER, C. Plaintiffs in error (who are husband and wife) will be designated as defendants, and defendants in error (who are copartners) will be designated as plaintiffs, in accord with their respective titles in the trial court.

Plaintiffs sued and, upon the verdict of a jury, recovered judgment in a justice's court for \$151.87, as a balance on account, and, upon trial *de novo* in the county court on appeal, again recovered judgment, upon the verdict of a jury, but only for the sum of \$105. Defendants denied some of the items charged against them in the account, and alleged payment in excess of the others.

Upon the trial, on issues thus made, the court, over objection, admitted as evidence plaintiffs' daybook, upon the testimony of the bookkeeper to the effect that the entries of sales therein, as charges against defendants, were correctly made by him, at the end of each day of such sale or on the day next following, from unproduced and unaccounted for "credit tickets" made by the two plaintiffs, as principal salesmen, and by a little "extra help," including said bookkeeper, as occasional salesman, as memoranda of the credit sales made by them, and turned in to the bookkeeper by them at the end of each such day; and it further appears from the testimony of such bookkeeper that all this was in the usual course of plaintiffs' business as merchants, and still further it appears that at the time of and with each credit sale the usual course and custom of such business required that the salesman should make and deliver to the purchaser a carbon copy of such credit ticket.

There was no proof that the credit tickets themselves were true and correct, other than may be found in the receipt of the tickets by the bookkeeper from the salesmen in the usual course

of the business and the aforesaid methods and course of business in respect to making such tickets and delivering such carbon copies thereof at times of sales; and, aside from the aggregate result of numerous admissions of correctness of items charged in the testimony of one of defendants not shown in either brief, the verdict and judgment are affirmatively supported only by the testimony of the bookkeeper as to the correctness of the entries made by him in such daybook from such tickets and as to the usual course and the methods of plaintiffs' said business, together with the testimony of one of the plaintiffs and of a justice of the peace that one of the defendants, Mrs. Navarre (who apparently was the one in the better position to know, and who alone, by testimony, disputed any item charged in the account), before the trial had in the justice court, if not before suit was commenced, admitted the indebtedness as charged, except that she did not think she got a few little items so charged, and further stated that, if the other one of the plaintiffs had not made her mad, the account would have been paid.

It appears that almost, if not quite, all the purchases, not made by Mrs. Navarre in person, were made by defendants through the agency of their sons and daughters, who were not produced as witnesses.

Mrs. Navarre, in her testimony, denied that she purchased many of the items charged, denied that any of the family purchased others, expressed doubt as to the purchase of others, and admitted the purchase of the others.

Both defendants testified as to payments for which they claimed credits not given in the account.

The alleged error in admitting the daybook in evidence goes only to the charges entered against defendants from the credit tickets.

The record does not disclose that any inconvenience would have resulted from requiring the production of the testimony of the bookkeeper's informants, especially the testimony of the two plaintiffs and of the bookkeeper himself to the extent of their

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knowledge, to the effect that the credit tickets turned in to the bookkeeper truly and correctly represented proper charges for merchandise sold and delivered to defendants.

In the absence of a statute to the contrary, the general rule appears to have been and to be that before books of account, produced by the entrant, are admissible as evidence, it must appear that the entrant had personal knowledge of the truth of the entries when he made them, and that they were correctly made by him, or, if made upon information derived from another, it must appear that the information itself was true and correct, so that, under such circumstances, the testimony of the entrant must be reinforced by that of his informant, unless such informant is dead, absent from the jurisdiction, or otherwise unavailable. The Modern Law of Evidence (Chamberlayne) sec. 3074; Wigmore on Evidence, secs. 657, 1530; Elliott on Evidence, sec. 462; *Schnellbacher v. McLaughlin P. Co.*, 108 Ill. App. 486; *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952; *Kent v. Garvin*, 1 Gray (Mass.) 148; *Jackson v. Evans*, 8 Mich. 476; *Paine v. Sherwood*, 21 Minn. 225; *Rothenberg v. Herman*, 90 N. Y. Supp. 431; *Ives v. Waters*, 30 Hun, 297; *Venning v. Hacker*, 2 Hill (S. C.) 584. However, there are cases to the contrary. See *Bailey v. Barnelly*, 23 Ga. 582; *Taylor v. Tucker*, 1 Ga. 231; *Groschell v. Knoll*, 10 Ky. Law. Rep. 314; *Kline v. Gundrum*, 11 Pa. 242; *Jones v. Long*, 3 Watts (Pa.) 325.

In Wigmore on Evidence, sec. 1530, p. 1895, in discussing exceptions to the rule rejecting hearsay, in respect to the necessity of showing the entries to be true and correct by the testimony of the entrant and his informant, it is said:

"The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclu-

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sion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who, as attorneys, have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical."

See the following cases cited by the author as supporting the text just quoted: *Fielder v. Collier*, 13 Ga. 499; *Nelson v. Bank*, 69 Fed. 805, 16 C. C. A. 425; *Continental National Bank v. First Nat. Bank*, 108 Tenn. 374; 68 S. W. 497; *United States v. Cross*, 20 D. C. 379; *Donovan v. B. & M. R. Co.*, 158 Mass. 450, 33 N. E. 583; *Northern P. R. Co. v. Keyes* (C. C.) 91 Fed. 47; *United States v. Venable C. Co.* (C. C.) 124 Fed. 267; *Dohlmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Firemen's Ins. Co. v. Seaboard A. L. Co.*, 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517; *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841; *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; *Madunkunk D. & I. Co. v. Allen C. Co.*, 102 Me. 257, 66 Atl. 537; *Wells Whip Co. v. Tanners' N. F. Ins. Co.*, 209 Pa. 488, 58 Atl. 894; *Pelican Lumber Co. v. Johnson*, 44 Tex. Civ. App. 6, 98 S. W. 207; *Grunberg v. U. S.*, 145 Fed. 81, 76 C. C. A. 51.

At best, books of account are only presumptive and disputable evidence; and, even where the entrant testifies he correctly made the entries from personal knowledge of the transac-

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tions entered or from information which his informer testifies was truly and correctly given from personal knowledge at the time, neither the court nor the jury are bound to accept such entries as true and correct, unless free from inherent improbability, and unless unimpeached and uncontradicted by other evidence; and, in logical effect, the exception to the rule against hearsay evidence, as quoted above from Mr. Wigmore, apparently reposes on the trial judge the duty to exercise a sound discretion in respect to the admission of such books upon the testimony of the entrant that in due time he correctly made the entries from information received by him from proper sources in the usual course of the business, without requiring the production of the testimony of his informants as to the truth of the information, where to do so would entail inconvenience outweighing the utility of same.

In connection with the consideration of whether and to what extent inconvenience, on the one hand, and want of utility, on the other hand, tends to justify the admission of such books without producing the testimony of the persons having original knowledge and giving the entrant the information from which he made the entries, the trial court, in the absence of statute to the contrary, perhaps should consider the nature and amount of the account, the ease or difficulty with which the defendant may disprove erroneous charges against him, and his preparedness or unpreparedness in this regard so far as apparent, the probability or improbability that the testimony of the original informants will be of considerable value in respect to memory after such lapse of time as has occurred, and, in connection with all other considerations, the inconvenience and burden that would be involved in requiring the production of such informants.

In the light of the foregoing, which is aside from any statutory peculiarity, we come now to consider whether and to what extent section 4277, Stat. 1893 (section 4574, Wilson's Rev. & Ann. St. 1903, section 5907, Comp. Laws 1909, and section 5114, Rev. Laws 1910), which is applicable in the present case, extends the exception to or otherwise changes the aforesaid general rule. Said section reads:

"Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county."

The statute thus specifies only the oath of the available entrant as a means of proof, and seems to contemplate that sufficient proof of correctness of entries in books of account may be made by the entrant alone; and in many, if not most, instances such proof by the oath of the entrant can at best only be made by his testimony that in the usual course of business, and in due time, he correctly made the entries from information derived from proper sources. This view is in practical accord with and (notwithstanding it is generally presumed that a statutory enactment is intended to change the existing law as stated in *Reed v. Goldneck*, 112 Mo. App. 311, 86 S. W. 1104) is, perhaps, not weakened by the fact that in Rev. Laws 1910, which did not go into effect until May 16, 1913, this section of the statute appears (as section 5114) with the addition of the following words next after a comma which now takes the place of the former period at the end of the old section: "Or upon proof that the same were made in the usual course of business"—thus recognizing the probative force inherent in the "usual course of business," and making it alone sufficient evidence of correctness to admit such books. The case of *Drumm-Flato Com. Co. v. Edmisson*, 17 Okla. 344, 87 Pac. 311, does not appear to be in conflict nor inconsistent with this view.

The book in which the entries are first permanently made, which is usually the daybook, is the book of original entry, notwithstanding prior individual memoranda designed to serve the temporary purpose of a report from which the bookkeeper may and does, at or near the time of each transaction reported, make entry in the daybook. The Modern Law of Evidence, by Chamberlayne, secs. 3085, 3086, 3087, and 3091; Wigmore on Evidence, secs. 1548 and 1558; Elliott on Evidence, secs. 459 and 461; Jones on Evidence (2d Ed.) secs. 569 and 370.

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When a daybook is kept, as in the present case, the credit tickets, we assume, are not usually compiled or kept in book form, so as to be of the requisite permanent character and conveniently available to show the items and state of the account.

At the trial there was no denial of the evidence tending to show that defendants received carbon copies of the credit tickets from which the book entries were made, nor explanation of failure to produce them. Defendants' early knowledge of the contents of the account and the result of the first trial must have sufficiently warned them of the necessity of and how to make preparation to meet and disprove errors in such account at the long subsequent trial from which this appeal was taken. The absence of the testimony by the bookkeeper's informants, to the effect that the credit tickets delivered to the bookkeeper were true and correct, militated in natural reason and was probably so considered by the jury against the probative force of the entries in the book admitted. The brief of defendants does not show, by analysis of the evidence, to what further extent, than they did, the jury might properly have reduced by their verdict plaintiffs' demand, even if they had been instructed to disregard the book entries as evidence, or those entries had not been admitted in the first instance, and the jury had had for basis of verdict only the other evidence in the case, does not show whether and to what extent the admission of the daybook, if error, was harmful, in view of the testimony of defendants, especially that of Mrs. Navarre, and, in respect to the admission of these book entries, it does not appear but that defendants had a fair trial in the court below.

The only other error urged in defendants' brief appears to be probably of minor importance, and is not so specifically and clearly presented as to require consideration.

We are of opinion that the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

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No. 3004. Opinion Filed November 18, 1913.

Rehearing Denied February 28, 1914.

(138 Pac. 1029.)

1. **JUDGMENT—Res Judicata—What Constitutes.** A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action, and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action.
2. **SAME—Basis of Estoppel.** The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination? and not, upon what evidence or by what means was it reached?
3. **SAME—Extent of Estoppel.** The inquiry of *res judicata* is not limited to the mere formal judgment. It extends to the pleadings, the verdict or the findings, and the scope and meaning of the judgment is often determined by the pleadings, verdict, or findings.
4. **SAME—Determination of Jurisdiction.** The question of jurisdiction over the defendant Geiser Manufacturing Company was by said defendant directly put in issue by its motion to vacate and set aside the former judgment of December 9, 1907. A hearing thereon being had, the motion was overruled, and the court's judgment became final. Held, in a subsequent trial between the same parties, concerning the same subject-matter, that the judgment so rendered was conclusive upon said defendant, and that the question of jurisdiction could not again be considered, though grounds therefor existed that were not before, but could have been, urged.

(Syllabus by Sharp, C.)

Error from District Court, Alfalfa County;
James B. Cullison, Judge.

Mortgage foreclosure proceedings, brought by the Geiser Manufacturing Company against D. Puffinbarger and Rilla Puffinbarger, and to declare plaintiff's mortgage prior and paramount to the interest or claim of the defendant McDuffie. Judgment for plaintiff, and defendant McDuffie brings error. Reversed.

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Titus & Carpenter, for plaintiff in error.

Burford & Burford, for defendants in error.

Opinion by SHARP, C. On the 15th day of March, 1906, the Union Central Life Insurance Company instituted an action in the district court of Woods county, Oklahoma Territory, in which Andrew J. Williams, Tallie Williams, D. Puffinbarger, Rilla Puffinbarger, the Geiser Manufacturing Company, G. J. McDuffie, Jacob G. Winne, and Scott E. Winne, partners as Winne & Winne, were named as defendants. The action was to foreclose a mortgage on a tract of land, situated in said county, given to secure a note executed to the plaintiff by defendants Williams and wife. In the petition it was charged that the remaining defendants had, or claimed to have, some interest in the mortgaged premises, which it was asserted were junior and inferior to plaintiff's said mortgage. The defendant McDuffie filed therein his answer and cross-petition, and asked to have foreclosed a mortgage on said lands, executed to him by his co-defendants, D. Puffinbarger and Rilla Puffinbarger, admitting in his said cross-petition the priority of the mortgages held by the Union Central Life Insurance Company and Winne & Winne, and in which it was asked that the pretended claims or liens of Williams and wife and the Geiser Manufacturing Company be extinguished and held for naught, and they forever barred of any right, title, or interest in and to said premises. The defendant Geiser Manufacturing Company, being a nonresident, was not served with summons, but an attempt was made to obtain service by publication. No appearance was entered by said defendant, and on the 9th day of December, 1907, the case coming regularly on for trial, judgment was rendered in behalf of the plaintiff Union Central Life Insurance Company foreclosing its mortgage, and also foreclosing the mortgages held by Winne & Winne and McDuffie, and the latter being found to be inferior only to that of the plaintiff therein and the defendant Winne & Winne; the court further finding that the Geiser Manufacturing Com-

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pany, although duly and legally summoned to appear, was in default, and, it was determined, had no interest or claim in or to the premises sought to be foreclosed.

The present action was filed in the district court of Alfalfa county on the 30th day of June, 1909, and the Puffinbargers, McDuffie, the Union Central Life Insurance Company, and Y. G. Patterson were made parties defendant, though no summons was ever served on the two defendants last named. Plaintiff's action was brought to foreclose a certain alleged mortgage, executed to it by the Puffinbargers, on the same land involved in the original foreclosure suit, brought in the district court of Woods county, by the Union Central Life Insurance Company. In its petition it asks to have its mortgage declared superior and paramount to any interest, lien, or claim of the defendant McDuffie.

On February 11, 1910, the defendant Geiser Manufacturing Company filed in the district court of Woods county its motion to vacate and set aside the judgment rendered against it on December 9, 1907, as well as to the sheriff's deed and the decree of confirmation, subsequently made and entered in said action. On the 6th day of May, 1910, said motion was overruled. No appeal from this order was ever prosecuted, nor was any further attempt made in said original proceedings to vacate or set aside the original judgment.

On the 10th day of March, 1911, in the present action, judgment was rendered, foreclosing the mortgage of the Geiser Manufacturing Company, and decreeing that the defendant McDuffie was without right, title, or interest in and to said lands, senior and superior to plaintiff's right, except as assignee of the Union Central Life Insurance Company and Winne & Winne. This, presumably, from the fact that McDuffie had purchased the land at the foreclosure sale held in Woods county, and that said last-named mortgagees had received, on account thereof, the full amount of their claims.

In the motion to vacate and set aside the judgment filed in the district court of Woods county, the defendant in error Geiser Manufacturing Company charged that the pretended service by publication against it was null and void, and of no effect, for the

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reason that no sufficient affidavit, upon which to base service by publication, was at any time filed in the original case prior to the rendition of judgment therein barring and foreclosing it of its right, title, and interest in and to the premises in question; that no other service of summons was made or attempted, and no appearance entered by it in said proceedings. To the present action defendant McDuffie answered, pleading, in bar of plaintiff's right to prosecute its action, the judgment rendered by the district court of Woods county on May 6, 1910, overruling and denying the motion of the Geiser Manufacturing Company to vacate and set aside the judgment theretofore rendered against it in that court. The amended answer sets out *in extenso* the pleadings, judgment, motion, and final judgment overruling motion, as tending to show the former adverse adjudication of plaintiff's claim. The plaintiff filed both an original and an amended reply, but in neither of them was issue taken with the defendant's allegation of what occurred in the district court of Woods county. In both the original and amended replies it was contended that the judgment rendered against it by the district court of Woods county was void and of no force or effect, by reason of the fact that the publication notice was based upon an insufficient, defective, and void affidavit, and that at no time had it any knowledge of the pendency of the original action, and by reason thereof the judgment rendered against it was a nullity.

The land sought to be foreclosed by the several mortgagees was situated in that part of Woods county which, upon the advent of statehood, became a part of Alfalfa county (section 326b, Williams' Ann. Const. Okla.). The action, being one pending in a district court of Oklahoma Territory, at the time said territory became a part of the state of Oklahoma, and not being transferred to the United States court, was properly proceeded with, held, and determined by the district court of Woods county. Section 3, Amendment to Enabling Act (chapter 2911, 34 St. at L. 1287); section 27, art. 25, Constitution.

It is contended by plaintiff in error: (1) That, regardless of the sufficiency in the first instance of the affidavit upon which

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the publication notice was based, the Geiser Manufacturing Company, by filing its motion to vacate and set aside the judgment, sheriff's sale, and decree of confirmation, thereby entered its appearance and validated all previous proceedings had in said action; (2) that whether or not the said motion was general or special, it having been decided adversely to defendant in error, and no appeal therefrom prosecuted, the judgment of the district court of Woods county was final and could not subsequently be collaterally attacked in the Alfalfa county district court. The first question presented has often been before this court, and many of the authorities are reviewed in *Ziska v. Avey et al.*, 36 Okla. 405, 122 Pac. 722.

But we deem it unnecessary to determine whether the motion in the instant case was properly confined to the question of jurisdiction, for it is our opinion, as we shall presently see, that the judgment of the district court of Woods county, being properly pleaded in bar, was *res judicata* to the action brought and then pending by the Geiser Manufacturing Company to foreclose its mortgage in the district court of Alfalfa county. To meet the plea of *res judicata*, it is urged by counsel for defendant in error that the district court of Woods county, in passing upon its motion to vacate the original judgment rendered against it, was not required to determine the validity of the affidavit for publication, as against a party shown to be a foreign corporation, having a regularly appointed resident agent, but that it was only required to determine whether the affidavit, upon which the publication notice was based, was good upon its face, and that in fact the court could not tell from the pleadings of either party whether the Geiser Manufacturing Company was a corporation, and therefore that the corporate existence of the manufacturing company, its appointment of an agent, or its domicile, were not in issue there, and were not determined. True, the motion to vacate and set aside the judgment does not appear to be predicated upon the particular objection that the affidavit for service by publication did not charge that defendant corporation had failed to comply with the statutory requirements, permitting it to do business in the territory of Oklahoma.

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including the designation of an agent upon whom service of summons might be had, as was held mandatory by this court in *Nicoll et ux. v. Midland Savings & Loan Co.*, 21 Okla. 591, 96 Pac. 744, and in the cases cited therein. But counsel are incorrect in saying that the court could not, from the pleadings of either party, tell whether the Geiser Manufacturing Company was a corporation, as in the original petition of the Union Central Life Insurance Company it was charged that said defendant was a corporation, as did also the defendant's own motion to vacate and set aside the judgment, while the affidavit for publication charged that said defendant resided outside of the territory of Oklahoma, and that plaintiff was unable with due diligence to make service upon it in the territory of Oklahoma. True the allegations of the petition and the motion to vacate the judgment cannot properly be taken into account in aid of the affidavit for publication, though they may be considered for the purpose of showing what was before the court at the time it denied defendant in error's motion, as in such cases we may look, not alone to the judgment, but to the pleadings and other records. *Woodworth v. Town of Hennessey*, 32 Okla. 267, 122 Pac. 224; *Hoisington v. Brakey*, 31 Kan. 563, 3 Pac. 355. If the issue that the Geiser Manufacturing Company was a non-resident corporation, and had not complied with the laws of the territory with regard to the appointment of a resident agent, was a fact, it was one known to the corporation itself, and would have furnished a good and sufficient reason in law for vacating the judgment, either by the trial court or, if the movant was unsuccessful there, in this court. The question determined by the district court of Woods county was that it had acquired jurisdiction over the Geiser Manufacturing Company, and, although seemingly the court was in error in denying the relief, yet, no appeal having been prosecuted, nor further effort made in that court to be relieved of the adverse judgment, the district court of Alfalfa county could not permit such judgment to be collaterally attacked at a subsequent trial.

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is,

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has there been such determination? and not, upon what evidence or by what means was it reached? The facts conferring jurisdiction upon the Woods county district court had been judicially determined, and it is immaterial that reasons may have existed why this adjudication should not have been made as made, as the controversy was determined.

The leading case upon the question of to what extent a former adjudication may be pleaded in bar is that of *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, where Mr. Justice Field laid down the following rule, which has been consistently adhered to by that court:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

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Fayerweather v. Ritch, 196 U. S. 275, 25 Sup. Ct. 58, 40 L. Ed. 193, 210; *Virginia-Carolina Chemical Co. v. Kervin*, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179. If, then, a judgment is conclusive, not only of every ground of recovery or defense actually presented in the action, but also every ground which might have been presented, it cannot be said that defendant in error is not precluded by the former judgment. It had elected its forum, chosen its ground of attack, and the facts pertaining to its having appointed an agent were within its own knowledge. It should have tendered the issue that, as a nonresident corporation having a resident agent, service by publication could in no event be had upon it. It chose, however, to litigate the question of jurisdiction over it upon other grounds, and for other reasons, notwithstanding the primary question involved in both courts at all times was that of jurisdiction.

The question presented is not a new one in this court. In *Woodworth v. Town of Hennessey*, *supra*, we said:

"A fact or question which is actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action, and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

It was also said, quoting from *Commissioners of Marion County v. Welch*, 40 Kan. 770, 20 Pac. 484:

"A judgment is conclusive of all matters actually litigated, and as to all matters that might, under the pleadings, have been litigated."

In *City of El Reno et al. v. Cleveland-Trinidad Paving Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650, it was held that all questions that were or could have been litigated at that time, by the plaintiff in a former action, or any other property owner of the same class, affecting the validity of the proceedings of the city authorities, or of the contract predicated thereon, must of necessity be *res judicata*. Both opinions review

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many authorities, and are in full harmony with our conclusions here. The same rule is announced in *Engle et al. v. Legg*, 39 Okla. 475, 135 Pac. 1058, wherein it is said:

"The judgment in a former action, involving the same subject-matter, is conclusive, not only as to defenses which were permitted in such action, but also as to all defenses which might have been but were not presented."

Other Oklahoma cases are *Territory ex rel. Jones, County Attorney, v. Hopkins*, 9 Okla. 149, 59 Pac. 980; *Pratt v. Ratliff*, 10 Okla. 168, 61 Pac. 523; *Pettis et ux. v. McClain et al.*, 21 Okla. 521, 98 Pac. 927.

The issue of jurisdiction, having been submitted and finally determined, cannot again be opened up on account of some new ground, tardily urged, and which might have been presented at the original trial. There must be some end to litigation.

As was said in *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42:

"The doctrine of estoppel by former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other."

The sale made by the sheriff of Woods county, the order of confirmation, and the sheriff's deed, made to plaintiff in error, were void under authority of *Farmers' State Bank of Ingersoll v. Wilson et al.*, 34 Okla. 755, 127 Pac. 395, and no affirmative relief can here be granted the plaintiff in error, as prayed for both in the lower court and here.

For the reasons given, plaintiff below was entitled to no relief, and the judgment of the trial court should be reversed.

By the Court: It is so ordered.

ADAMS v. NORTON *et al.*

No. 3017. Opinion Filed February 28, 1914.

(139 Pac. 254.)

APPEAL AND ERROR—Presentation for Review—Errors at Trial—Denial of New Trial. Where plaintiff in error fails to assign as error, in his petition in error, the overruling of a motion for a new trial, no question which seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below is properly presented to this court, and such alleged errors cannot, therefore, be considered.

(Syllabus by Sharp, C.)

Error from District Court, Nowata County;
T. L. Brown, Judge.

Action by Louisa Adams against W. L. Norton, J. H. Elkins, Isaac Cohn, W. V. French, J. B. Hoge, and Henson Oil Company. From an adverse judgment, plaintiff brings error. Affirmed.

Eugene B. Lawson, for plaintiff in error.

James A. Veasey and *L. A. Rowland*, for defendant in error Henson Oil Company.

W. J. Campbell, for defendants in error French and Hoge.

Opinion by SHARP, C. Plaintiff in error, in her petition in error, assigns errors committed by the trial court in the following particulars: (1) Error in rendering judgment in favor of defendants French, Hoge, and Henson Oil Company, and against plaintiff for costs; (2) error in not rendering judgment in favor of plaintiff and against defendants; (3) error in finding, as a matter of law, that plaintiff was not entitled to recover against said last-named defendants; (4) that the judgment is contrary to law; (5) that the judgment is contrary to the evidence; (6) that the judgment is contrary to both the law and evidence; (7) because of divers other errors appearing in the record.

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A motion for a new trial was filed and overruled, to which plaintiff excepted, but the action of the court in overruling said motion for a new trial has not been assigned as error in the petition in error in this court, and therefore none of the matters urged in her brief can be considered. All of the errors assigned are those charged to have occurred during the progress of the trial, and it is a rule well established that, where the plaintiff in error fails to assign as error the overruling of her motion for a new trial, in her petition in error, no question which seeks to review errors alleged to have occurred during the progress of the trial in the court below is properly presented to this court. *J. J. Douglas Co. v. Sparks*, 7 Okla. 259, 54 Pac. 467; *Beall v. Mutual Life Ins. Co.*, 7 Okla. 285, 54 Pac. 474; *Martin et al. v. Gassert*, 17 Okla. 177, 87 Pac. 586; *Whiteacre v. Nichols*, 17 Okla. 387, 87 Pac. 865; *Kimbriel v. Montgomery*, 28 Okla. 743, 115 Pac. 1013; *Meyer v. James*, 29 Okla. 7, 115 Pac. 1016; *St. Louis, I. M. & S. Ry. Co. v. Dyer*, 36 Okla. 112, 128 Pac. 265.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

OKLAHOMA MOLINE PLOW CO. v. SMITH.

No. 3050. Opinion Filed February 28, 1914.

(139 Pac. 285.)

1. **JUDGMENT—Sales—Replevin by Seller—Evidence—Judgment.** An implement company sold to a retail merchant a number of bills of merchandise, the sales being evidenced by written contracts in which it was provided that the title to and ownership of the goods sold should remain in the vendor until payment of the purchase price, and that, if the purchaser sold out or became insolvent, all notes given for goods bought under the contract should then become due and payable. The vendor thereafter, but before the maturity of the notes given by the purchaser, brought an action of replevin to recover the implements in the latter's possession, claiming the purchaser had (1) sold out, and (2) had become insolvent. The evidence introduced, considered in connection with the allegations of defendant's answer, failed to prove a sale, but, instead, an agreement to sell on certain conditions to be performed. There was neither proof nor admission of defend-

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ant's insolvency, though there was evidence that the proposed purchaser of the stock had taken steps to comply with the bulk sales act, and that a subsequent meeting of the defendant's creditors had been held. **Held**, that the court properly sustained a demurrer to plaintiff's evidence.

2. **SALES**—"Actual Sales"—"Executory Contract to Sell." The distinction between an actual sale and a mere executory agreement to sell is that, in the former, the thing which is the subject of the contract becomes the property of the vendee the moment the contract is concluded, and without regard to the fact whether the goods be actually delivered to the buyer or remain in the vendor's possession; while, in the latter, the goods remain the property of the vendor until the contract is executed.
3. **INSOLVENCY**—Definition. Aside from the classes of cases controlled by sections 231 and 4153, Comp. Laws 1909 (sections 215 and 3859, Rev. Laws 1910), it may be generally said that insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business.
4. **PLEADING**—Construction—Admission—Effect. An admission, in an adversary's pleadings, to be available, must be taken with all the qualifying clauses and limitations which the pleader has included in it. In other words, it must be taken as a whole; and, where facts are alleged in connection with an admission which nullify it, its effect as an admission is destroyed.
5. **APPEAL AND ERROR**—Presentation Below—Waiver of Objection. Where the court, after sustaining a demurrer to plaintiff's testimony, permits the defendant to withdraw his cross-petition, and thereupon discharges the jury from further consideration of the cause, and renders such judgment for the defendant as it was claimed the state of the pleadings and proof demanded, without objection on the part of plaintiff, other than to the court's action in sustaining the demurrer, the error, if any was committed, was waived by plaintiff's failure to object and except to the court's ruling.

(Syllabus by Sharp, C.)

*Error from District Court, Blaine County;
Jas. R. Tolbert, Judge.*

Action in replevin by the Oklahoma Moline Plow Company against O. A. Smith. From a judgment for defendant, plaintiff brings error. Affirmed.

Shartel, Keaton & Wells and *A. L. Emery* for plaintiff in error.

L. H. Hampton for defendant in error.

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Opinion by SHARP, C. Plaintiff's action was one in replevin, and sought to recover the possession of a large number of wagons and buggies theretofore sold by it to the defendant. The several sales were evidenced by written contracts, each of which includes the following two provisions:

"Second party agrees that the title to and ownership of all goods which may be shipped as herein provided, shall remain in the party of the first part, and their proceeds, in case of sale, shall be the property of the Oklahoma Moline Plow Company, and subject to their order until full payment shall have been made for said goods or said notes and until any judgment rendered therefor or thereon is paid in full.

"If the purchaser under this contract sells out, fails or becomes insolvent or dies; or if any member of the purchaser's firm fails, sells out or becomes insolvent or dies; or failure to pay notes or accounts at maturity; all accounts or notes for goods bought under this contract, including renewal notes in whose hands soever said notes may be, shall then become due and payable whether the notes be given in payment for goods or accounts or collateral security thereto."

The action was instituted December 7, 1909, at which time defendant was owing plaintiff two certain notes: One for \$1,540, dated July 9, 1909, due February 1, 1910; and a second for \$1,453.65, dated November 1, 1909, due March 24, 1910.

The plaintiff rests its right to recover possession of the wagons and buggies upon the above-mentioned provision of the sale agreements, claiming the defendant had sold out and was insolvent when its action was instituted. Defendant's demurrer to plaintiff's evidence being sustained, it is necessary that we first examine the evidence, and the admissions in defendant's answer, if any, to determine whether or not the court erred in sustaining the demurrer. By the first of the above-mentioned provisions of the contract, it will be observed it was agreed that the title to and the ownership of all goods therein described should remain in the vendor, and that their proceeds, in case of sale, should be the property of the vendor, subject to its order, until full payment had been made for the goods or notes taken, and until any judgment rendered thereon had been fully paid. By the second provision of the contract it was provided that if the purchaser sold

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out, failed, or became insolvent, or died, or failed to pay the notes or accounts owing by him at maturity, thereupon all accounts for goods bought under the contracts, including renewal notes, should then become due and payable without regard to whether the notes be given in payment for goods or accounts or collateral security thereto.

From the testimony and admissions in defendant's answer, had defendant done, or suffered to be done, one or more of the acts named? It is urged that the proof shows that he had (1) sold out, and (2) was insolvent, when the replevin action was brought. Defendant's first witness was the register of deeds of Blaine county, who merely identified certain of the sale contracts that had been filed for record in his office. The remaining testimony, other than the sale contracts themselves, was that given by M. L. Wood, plaintiff's resident manager in Oklahoma, who testified that plaintiff received a notice from a Mr. Pattee that he was about to purchase defendant's stock of goods; that the notice sent out was one provided for by the bulk sales statute, and conveyed the information that Pattee would proceed with the purchase if no objection was raised on the part of creditors; that subsequently a partial meeting of defendant's creditors was called at the former's solicitation. Further proof of the alleged sale by defendant, it is claimed by plaintiff, is found in defendant's answer and cross-petition. We have read this answer with care, and cannot agree with plaintiff's contention. It expressly denies that defendant either sold out, failed, or was insolvent. It is stated with much particularity that defendant and J. E. Pattee had entered into a contract, whereby the former had agreed to sell, and the latter agreed to buy, at the stipulated price of \$15,500, defendant's stock of merchandise in the town of Watonga, together with certain real property, and that said contract to sell included the property replevined by plaintiff, and provided further that said defendant was bound and obligated to deliver the stock of goods, wares and merchandise to the said Pattee free and clear of all liens, accounts, notes, or claims existing against said defendant, for or on account of any of said goods contained in said stock;

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that in fulfillment of that obligation, and for the protection of defendant's creditors, it was further agreed in said contract that due and legal notice of such intended sale should be given to all of the creditors of defendant; that thereafter said notices were given by registered mail, one of which was sent to and received by plaintiff. Nowhere in the answer is there any admission that the defendant had either sold out or that he was insolvent. On the contrary, the answer, taken as a whole, clearly and unequivocally sets out only a contract of sale on the part of defendant, as distinguished from a sale. It was the latter only that accelerated the maturity of the outstanding notes.

A "sale" in its broadest sense may be defined as the transfer of the property in a thing for a price in money, while a "contract to sell goods" is a contract whereby the seller agrees to transfer the property in goods to the buyer for a price, which the buyer pays or agrees to pay, and is sometimes termed an "executory contract of sale," or "an agreement to sell." It is said by an eminent author (Benjamin on Sales, secs. 3, 308) that the distinction between an actual sale and a mere executory agreement is that in a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the vendor; whereas, in an executory agreement, the goods remain the property of the vendor until the contract is executed.

Confessedly the stock of goods was never sold to Pattee, but instead the title thereto remained in Smith, subject only to the title yet retained by plaintiff under its original contracts of sale. Where under the contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a "sale"; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell." *Chalmers, Sale of Goods*, sec. 3; *Longfellow v. Huffman*, 57 Or. 338, 112 Pac. 8; *Idaho Implement Co., Ltd., v. Lambach*, 16 Idaho, 497, 101 Pac. 951; *Strong Deemer & Co. v. Dinning et al.*,

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175 Pa. 586, 34 Atl. 919. The proof of a sale was totally wanting; neither are there such admissions in defendant's answer as will supply the want of proof on the part of plaintiff.

An admission in a pleading, to be available, must be taken with all the qualifying clauses and limitations which the pleader has included in it, and all the facts alleged in connection therewith. The whole of the statement must be construed together, and, where facts are alleged in connection with an admission which nullify it, its effect as an admission is destroyed. In other words, an admission in a pleading of one's adversary must be taken as an entirety, and one who seeks to use such an admission must take it *cum onere*. *Clark v. Missouri, K. & T. Ry. Co.*, 179 Mo. 66, 77 S. W. 882; *Young v. Katz*, 22 App. Div. 542, 48 N. Y. Supp. 187; *Garrie v. Schmidt et al.*, 25 Misc. Rep. 753, 55 N. Y. Supp. 703; *Upton v. S. C. & G. E. R. Co.*, 128 N. C. 173, 38 S. E. 736.

Adverting to the second provision of the sale contracts, was there proof or admission in the defendant's answer of his insolvency when the action was begun? "Insolvency" is defined (sec. 4153, Comp. Laws 1909 [Rev. Laws 1910, sec. 3859]) as follows:

"A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so."

Section 231, Comp. Laws 1909 (Rev. Laws 1910, sec. 215), provides that a debtor is insolvent, within the meaning of the chapter on assignments for benefit of creditors, when he is unable to pay his debts from his own means as they become due. Independent of statute, it may generally be said that insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business. The definition is one generally accepted by both the state and federal courts. Words and Phrases, vol. 4, p. 3651. There may be room for serious doubt that either of the foregoing statutory definitions of insolvency applies in the instant case, on account of their apparent express limitations to the purposes of the particular act in which found. Accepting, however, the general rule as stated to be correct, we find neither proof nor admis-

sion of insolvency. No part of the indebtedness owing by defendant to plaintiff was due; neither is there proof that defendant owed any past-due debts. There is nothing to show the amount of defendant's indebtedness, other than that owing to the plaintiff, while, on the other hand, according to the allegations of the answer, the defendant was to receive from Pattee notes secured by real estate mortgages to the amount of \$18,423 less \$2,923. That subsequent meetings of creditors were held, the result of the sending out of notices by Pattee, in an effort to comply with the bulk sales act, is not of itself evidence of the defendant's insolvency. Neither can any inference of insolvency fairly arise from an endeavor to comply with said statute. Sections 7908 and 7909, Comp. Laws 1909 (Rev. Laws 1910, secs. 2903 and 2904.)

From what has been said, it is clear that plaintiff wholly failed to make out a case, for it must be kept in mind that, though under the contract the title and ownership of the property was in plaintiff, yet its right to take possession of the vehicles prior to maturity of its notes was based solely upon the grounds to which attention has been called. No other cause existed by which plaintiff was given the right to recover possession of the property sold to defendant, prior to the maturity of its demands. Having failed in its proof, the court properly sustained the defendant's demurrer to plaintiff's evidence. Such being the case, it was proper that the court enter the judgment that it did. It is provided by statute (section 5794, Comp. Laws 1909 [Rev. Laws 1910, sec. 5002]) that the party upon whom rests the burden of the issues must first produce his evidence; after he has closed the evidence, the adverse party may interpose a demurrer thereto, upon the ground that no cause of action or defense is proved. If the court shall sustain the demurrer, such judgment shall be rendered for the party demurring as the state of the pleadings or the proof shall demand. Both plaintiff's petition and affidavit for replevin named the several items sought to be replevined, with the value of each separately stated. It was shown by the testimony of plaintiff's witness Wood that these articles after seizure had been turned over to plaintiff by the sheriff.

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But it is unnecessary to determine the question of the right of the court to render judgment for the defendant for the return of the property or its value, for the record contains no objection to the court's action in this regard; the only objection made or exception taken being to the ruling of the court in sustaining the demurrer to the evidence. *Stanard v. Sampson et ux.*, 23 Okla. 13, 99 Pac. 796; *Brown v. First Nat. Bank*, 35 Okla. 726, 130 Pac. 140; *Davis v. Gray*, 39 Okla. 386, 134 Pac. 1100. The plaintiff having accomplished the main object of its suit, through the preliminary process of the court, it was proper to a final and complete determination of the action that such judgment be rendered in favor of defendant as authorized by the proof or the state of the pleadings, and whether the court proceeded in a proper manner is not subject to review in this court; no objection or exception at the time being taken.

The judgment of the trial court should in all things be affirmed.

By the Court: It is so ordered.

LIVINGSTON v. CHICAGO, R. I. & P. RY. CO.

No. 3053. Opinion Filed February 28, 1914.

(139 Pac. 260.)

1. **APPEAL AND ERROR—Dismissal—Brief.** Where the brief of plaintiff in error fails to contain the specifications of error complained of separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 of this court (38 Okla. x), the appeal may be dismissed.
2. **TRIAL—Appeal nad Error—Presentation Below—Failure to Instruct—Duty to Request.** Where a special instruction is desired, it is the duty of counsel requesting it to prepare and submit to the court such instruction in writing, properly numbered, and signed, and, upon timely delivery, request that it be given. Upon a failure so to do, where the court has given general instructions applicable to the issues and evidence, this court will not consider as error the court's failure to instruct, of its own motion, upon any given proposition.

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3. **APPEAL AND ERROR—Presentation for Review—Rulings on Instructions—Evidence.** Where none of the evidence appears in the record, and there is no statement of what it tended to prove, or that it raised the questions on which instructions are based, this court cannot, as a general rule, determine whether there was error in the rulings of the court in giving the instructions to which objection is made.

(Syllabus by Sharp, C.)

Error from District Court, Garfield County;
James B. Cullison, Judge.

Action by Noah L. Livingston against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Parker & Simons for plaintiff in error.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore,
for defendant in error.

Opinion by SHARP, C. No effort has been made in plaintiff's brief to comply with rule 25 of this court (38 Okla. x), which requires that the brief of the plaintiff in error shall contain the specifications of error complained of, separately set forth and numbered, and for that reason the appeal could very properly be dismissed. *Mahaney v. Union Investment Co.*, 23 Okla. 533, 101 Pac. 1054; *McReynolds v. Phipps et al.*, 31 Okla. 788, 123 Pac. 1125.

As we understand from a careful reading of plaintiff's brief, and the assignments of error contained in the petition in error, it is contended that the trial court erred in not defining what would constitute contributory negligence, and in not instructing that the burden of proving contributory negligence rested on the defendant, and in giving instructions numbered 7, 8, and 14. No instructions were requested by the plaintiff. It is very generally held that, where a special instruction is desired, it is the duty of counsel to prepare and submit to the court such desired instruction in writing, properly numbered and signed, and, upon timely delivery to the court, request that it be given, and that upon a failure so to do, where the court has given general instructions applicable to the issues and the evidence, an appellate court will not consider

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as error the court's failure to instruct upon its own motion upon any given proposition. *Moore v. O'Dell*, 27 Okla. 194, 111 Pac. 308; *First Nat. Bank v. Tevis*, 29 Okla. 714, 119 Pac. 218; *Chicago, Rock Island & Pacific Ry. Co. v. Baroni*, 32 Okla. 540, 122 Pac. 926; *St. Louis & S. F. R. Co. v. Crowell*, 33 Okla. 773, 127 Pac. 1063. The same rule applies where it is desired that the court more definitely or fully state any proposition embraced in the charge. *Huff v. Territory*, 15 Okla. 376, 85 Pac. 241. No requested instruction having been prepared and submitted by counsel, we cannot say that the court's failure to instruct constituted error.

The case-made does not contain the evidence or any part thereof; neither is there a statement of what the evidence was or what it tended to prove. It is not claimed by plaintiff in error that the verdict is not warranted by the evidence, but complaint alone is made of the giving of three certain instructions. We had occasion in *Turman v. Burton et al.*, 37 Okla. 5, 130 Pac. 149, to consider the exact question here presented. It was there said:

"Courts of error do not sit to decide moot questions, but to redress real grievances. It can, of course, never be said that the jury were misled by the giving of an erroneous instruction, or the refusal to give proper instructions, where they have reached the correct result by their verdict. Hence courts of review, in passing upon errors assigned in giving instructions, * * * should look into the evidence, and see if the verdict is right, and, if found to be so, should look no further. In *Town of Leroy v. McConnell et al.*, 8 Kan. 273, the record was in very much the same condition as here. It was observed in the opinion by Kingman, C. J.: 'One of the errors complained of is the giving of certain instructions, and the refusal to give others. It would be labor wasted to examine the instructions given, for, even if it were certain that they were not correct as legal principles, there would be the uncertainty as to whether they applied to the evidence in the case; and, if they did not, then, though there may have been error, it is not shown to be prejudicial to the plaintiffs. The plaintiffs in error must show that such errors have been committed as have wrought prejudice to them, or may have done so, or there can be no reversal of the judgment. It is not necessary to bring up all the evidence in every case, but enough must be shown, either by the testimony or by statement in the bill of exceptions, for this court to see that the

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instructions are applicable to the evidence. The same remark applies to instructions refused. If they enunciate correct principles of law, and have no applicability to the case, then the court does right in refusing to give them; and, in the absence of the evidence, we are unable to say that such instructions ought to have been given. All presumptions are in favor of the rulings of the court below, and this presumption is not removed by any number of possibilities.' See, also, *Missouri River, F. S. & G. R. Co. v. Owen*, 8 Kan. 410; *State v. English*, 34 Kan. 629, 9 Pac. 761; *Stetler v. King*, 43 Kan. 316, 23 Pac. 558; *Gray v. City of Emporia*, 43 Kan. 704, 23 Pac. 944. The objectionable instructions given, as well as the requested instructions refused, were each based upon the evidence, not upon the issues joined by the pleadings, and, without the evidence before us, we are unable to say that any error was committed. The instruction given may have been proper, the one refused improper; or the requested instruction may not have been applicable to the evidence; or it may be that the testimony was such that the jury could have arrived at no other verdict, and the error, if error was committed, was not prejudicial. The court charged that the burden of proving payment was on the defendant; that, while a written receipt constituted *prima facie* evidence of payment, it was not conclusive, and was subject to explanation, and might upon proof be entirely rejected."

Many other authorities, some from our own court, might be cited in support of the rule thus announced; however, it is of such general application in appellate courts that a further citation of authority or further discussion of the principle involved would serve no useful purpose. In the absence of the evidence, or of any statement of what it tended to prove, we cannot say that the giving of the instructions constituted reversible error.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

DORMAN v CONNECTICUT FIRE INS. CO.

No. 3055. Opinion Filed February 28, 1914.

(139 Pac. 262.)

1. **INSURANCE—Contract—Authority of Soliciting Agent.** Ordinarily a traveling soliciting agent, without actual authority to contract, who is furnished by his principal, an insurance company, with no *indicia* of authority other than printed blank forms of application for insurance, addressed to it, which either negative the idea of authority to contract, or, as in the present case, is signed by the applicant without actual knowledge of its contents, does not have the apparent authority to enter into a contract of insurance.
(a) **Quære**, where such forms, within the actual knowledge of the applicant, are free from specific limitation upon the authority of such agent, does he thus have the apparent authority to bind such principal, as inducement to the making of such application, by a temporary contract of insurance, until such principal may reject such application?
2. **SAME—"Contract of Insurance"—Essentials.** There is no contract of insurance unless the minds of the parties have met in agreement as to (a) the subject-matter, (b) the risk insured against, (c) the period of risk, (d) the amount of insurance, and (e) the premium.
3. **SAME—Unaccepted Application—Effect.** An unaccepted application for insurance, accompanied by the premium, although retained without notice of objection for five days after its date and until the applicant has suffered the loss against which he desired the insurance, is not a contract of insurance.
4. **SAME—Implied Acceptance of Application—Retention of Premium.** Acceptance of an application may ordinarily be inferred from the retention and application of the premium; but, when there is evidence reasonably tending to show that there was no such acceptance in fact, the law does not imply acceptance from such retention; and the adverse finding and judgment in the trial court is conclusive against appellant's claim of acceptance.

(Syllabus by Thacker, C.)

Error from District Court, Grant County;
W. M. Bowles, Judge.

Action by James Dorman against the Connecticut Fire Insurance Company, a foreign corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

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C. S. Ingersoll and F. G. Walling, for plaintiff in error.

Scothorn, Caldwell & McRill, for defendant in error.

Opinion by THACKER, C. Plaintiff in error was plaintiff, and defendant in error was defendant, in the trial court; and this action was upon an alleged contract of insurance upon a growing crop of wheat, for loss sustained by hail pending an application for a policy; judgment being for the defendant upon the evidence. Plaintiff, on May 19, 1909, voluntarily applied to defendant for insurance by voluntarily approaching its agents and signing, without actual knowledge of its contents, an application in printed form furnished by defendant and prepared for signature by and in the hands of Joel Mulligan and C. L. Nash, who were then acting as defendant's subagents under D. M. Sullivan. At the same time, plaintiff executed his note without full knowledge of its contents to said Nash, or to the Bank of Nashville, Okla., under the impression that it was to defendant, which note, said Nash cashed at said bank, for the full amount of the premium for such insurance. Mulligan and Nash, who had no actual authority to issue policies or enter into contracts of insurance, and were merely traveling solicitors for and takers of applications and premiums in Grant county, Okla., addressed to defendant for such insurance, on the next following day, May 20, 1909, at Pond Creek, in said county, presented said application to said Sullivan, an agent with office there, and authorized to accept or reject such applications and enter into contracts of insurance. On the third day next thereafter, May 23, 1909, plaintiff suffered the loss for which he sues. When Mulligan and Nash, on the third day before the loss, presented the application to Sullivan, the latter first objected to it, and marked it "Refused" because it was for insurance upon the equivalent of 60 acres of wheat on one section of land in excess of the 100-acre limit which the rules of the defendant imposed; but, upon the suggestion of Mulligan and Nash, Sullivan immediately indicated a willingness to hold it pending an opportunity to present it to Mr. Rushmore, defendant's state agent, for his instruction upon it, in the belief that he might consent to its acceptance notwithstanding such excess; and the

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said application was being so held, and was still not accepted by Sullivan nor presented to Rushmore on the fourth day after the day of its date, when plaintiff's loss occurred; the premium being held in the hands of Nash or Mulligan, or both.

It certainly cannot be, and apparently is not, contended that defendant expressly accepted the application and entered into a contract of insurance through its duly authorized agent, Sullivan; and, if there was such contract, it must be found in an acceptance inferred from the retention of the premium, or in an actually or apparently authorized acceptance of the application by Mulligan and Nash, and in a contract made on the part of the defendant through them; but, allowing the presumption we must in favor of the judgment of the trial court, no such acceptance or contract appears.

The only evidence upon which we may assume plaintiff claims there was such a contract is found in the retention of the premium and in the following voluntary statement made by the plaintiff, when one of his counsel asked him, the day of the week on which he signed the application, to wit:

"I asked when that *policy* would take effect; one or two of them, I could not say which, says, 'To-day noon at 12 o'clock; to-day noon at 12 o'clock.'"

It is unnecessary to determine whether this should be understood to mean more than that, if the application was accepted and a *policy* issued it would relate back to noon of May 19, 1909; but we cannot assume the trial court either accepted as true any evidence which would tend to impeach the judgment, and is in conflict with other evidence, or construed any dubious testimony otherwise than as favorable to the judgment; and, further, if we should so assume, we cannot assume the trial court found the existence of facts from which the authority of Nash and Mulligan to make such a contract would appear. Neither Mulligan nor Nash, who were witnesses for plaintiff, and apparently not unfriendly, was questioned or testified in regard to this imputed statement; and one of them, without contradiction, testified that the application was taken in the afternoon of the day of its date.

A contract of insurance consists of an agreement between the insured and the insurer, including the following elements: (1) The subject-matter; (2) the risk insured against; (3) the amount; (4) the period of risk; and (5) the premium; and there is no contract until the minds of the parties meet in these respects. 1 Briefs on the Law of Ins., by Cooley, 368, 392, 411, 513; 1 Law of Ins., by Charles Beach, Jr. 507; 1 May on Ins. secs. 43-65; 1 Joyce on Ins., secs. 45-50; Kerr on Ins., sec. 40. pp. 73-77; *Id.*, sec. 53, p. 113; *Shawnee Mut. Fire Ins. Co. v. McClure*, 39 Okla. 535, 135 Pac. 1150, and cases there cited: *Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218, and notes; *Bell et al. v. Hudson Bay Ins. Co. et al.*, 44 Can. Sup. Ct. 419, 21 Ann. Cas. 788, and notes; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134, and notes. As to an oral contract *in praesenti*, see *Van Arsdale-Osborne Brokerage Co. v. Cooper*, 28 Okla. 600, 115 Pac. 779; *Plat Whitman, Trustee, etc., v. Milwaukee Fire Ins. Co.*, 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25.

An application for insurance is not itself a contract, but is a mere proposal, which requires acceptance by the insurer through some one actually or apparently authorized to accept the same to give it effect as a contract. 1 Briefs on the Law of Ins., by Cooley. 413; 1 Joyce on Ins., sec. 54; 1 May on Ins. (3d Ed.) sec. 43H; Elliott on Ins., sec. 106; Kerr on Ins., sec. 51-52; Richards on Ins. (3d Ed.) sec. 282; *Van Arsdale-Osborne v. Young*, 21 Okla. 151. 95 Pac. 778; *Shawnee Mut. Fire Ins. Co. v. McClure*, *supra*.

Nor does the mere retention of both application and the premium, without any action thereon, constitute a contract of insurance. *Van Arsdale-Osborne v. Young*, *supra*; *Northwestern Mut. Life Ins. Co. v. Neafus*, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211, and notes; 1 Law of Ins., by Charles Beach, Jr., 499; 1 May on Ins., sec. 43H.

We have not overlooked the holding in *Van Arsdale-Osborne Brokerage Company v. Cooper*, *supra*, that "independent of the issuance and delivery of the policy the approval of said application may be made * * * impliedly by the acceptance and application of

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the premium"; but in that case it was indisputable that the application was actually accepted. The policy was actually issued, the same was lost in the hands of the local agent of the insurer without having been delivered to the insured, and the latter had, in response to notification given by him that he had not received the policy, been advised that another policy would be issued and sent to him upon his signing and returning a lost policy affidavit furnished to him; and, further, in that case it is stated that the question was "whether any evidence tends to show the approval of the application."

In the present case, such an implication or inference of fact in respect to the application, after it reached the hands of Sullivan on the day after it was signed, is clearly negated by other evidence.

Ordinarily a traveling soliciting agent, without actual authority to contract, who is furnished by his principal, an insurance company, with no *indicia* of authority other than printed blank forms of applications for insurance, addressed to it, which either negatives the idea of authority to contract, or, as in the present case, is signed by the applicant without actual knowledge of its contents, does not have the apparent authority to enter into a contract of insurance. Kerr on Ins. 203; Richards on Ins. Law (3d Ed.) 198; 1 Joyce on Ins., sec. 526.

The blank form of application furnished by defendant does not expressly limit the authority of its soliciting agents, except by the following provision therein, to wit:

"It is understood and agreed that a policy based on this application will in no event take effect sooner than noon of the day succeeding my having signed this application"—and, in view of the fact that no good reason appears why such blank forms should not specifically limit the authority of such agents to that actually given, and such agents be instructed by their principal to furnish a copy to the applicant, we reserve decision as to whether such merely soliciting agents, furnished as in this case with such blank forms, might not be therefrom found to have the apparent authority, as inducement to the making of the application, to enter into a temporary contract of insurance, not incon-

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sistent with the application itself, binding upon the insurer until the application is rejected by it, where the applicant has knowledge that such forms do not, in that respect, specifically limit the agent's authority (see 1 Briefs on Law of Insurance, by Cooley, 382, and 3 Briefs on Laws of Insurance, 2484, 2485; also 69 Am. St. Rep. 145); but, in the present case the applicant did not actually know the contents of the application, and had no knowledge as to whether the agent's authority was not further limited by the provisions thereof, and claims no contract of insurance other than a contemporaneous oral one somewhat inconsistent with the only limitation therein contained. The writing generally controls in such cases. *Joyce on Ins.* 61; *Elliott on Ins.* 159, 160; 2 May on *Ins.* 579; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64; *Allen v. Mass. Mutual Acc. Ass'n*, 167 Mass. 18, 44 N. E. 1053.

Even if it had appeared that the application was such as the defendant was accustomed to accept and that it probably would have been accepted if finally acted on by defendant before it had knowledge of the loss, which is not true, the overwhelming weight of authority is to the effect that mere delay in passing upon an application is not equivalent to its acceptance, as will appear from an examination of the authorities cited *supra*.

Although it has been held that where a policy is issued after loss of the crops intended to be insured, and it appears that it would have been issued in time to have operated as insurance thereon but for the unreasonable delay of the soliciting agent of the insurer taking the application in transmitting it to the proper officer to pass upon same and issue the policy, the insurer is liable for the loss (*Boyer v. State Farmers' Mutual Hail Insurance Co.*, 86 Kan. 442, 121 Pac. 329, 40 L. R. A. [N. S.] 167, and notes), yet in the present case it does not so much as appear that the application was acceptable, or would in any event have been accepted; and neither that case nor the case cited in the note thereto (in 40 L. R. A. *supra*) tends to support plaintiff's contention in this case.

Except as already stated in this opinion, there was no evidence whatever, either of the authority of Mulligan and Nash to

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enter into a contract of insurance binding upon defendant, or of any agreement between the plaintiff and these soliciting agents which, if they had authority, could be construed as a contract of insurance; and we do not feel authorized to disturb the judgment of the trial court, which, in effect, includes a finding of fact against plaintiff upon both propositions.

For the reasons stated, the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

STRAUGHAN v. COOPER.

No. 3085. Opinion Filed February 28, 1914.

(139 Pac. 265.)

1. **CONTRACTS—Avoidance—Incompetency to Execute—Intoxication.** A person so destitute of reason as not to know the nature or consequences of his act, although such mental condition be the result of his voluntary intoxication, may avoid a contract made by him at such time.
2. **NEW TRIAL—Motion—Essentials—Diligence.** A motion for a new trial upon the grounds of newly discovered evidence may be denied if facts constituting due diligence to have discovered same in time for the trial had be not stated therein.
3. **APPEAL AND ERROR—Exceptions Below—Instructions.** An instruction to the jury will not be considered here unless exception thereto was reserved in the trial court.
4. **SAME—Bills and Notes—Verdict—Sufficiency of Evidence.** The sufficiency of the evidence to sustain a judgment will be determined in the light of the evidence tending to support same, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts therewith.

(Syllabus by Thacker, C.)

Error from District Court, Kay County;

W. M. Bowles, Judge.

Action by B. C. Straughan against W. M. Cooper on a promissory note. Judgment for defendant, and plaintiff brings error. Affirmed.

L. C. Brown for plaintiff in error.

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Sam K. Sullivan for defendant in error.

Opinion by THACKER, C. Plaintiff in error, as plaintiff, on April 1, 1910, sued defendant in error, as defendant, upon a note dated May 23, 1907, due one year after date, for the principal sum of \$475, bearing interest at the rate of 10 per cent. per annum from its date, and purporting to have been executed by defendant to plaintiff at Arkansas City, Kan.; and defendant's answer consisted of a general denial and also of allegations as follows:

"Defendant specifically denies the execution of said note, and alleges that if at any time he signed the said note, he was in such an intoxicated condition that he has no recollection or knowledge of having signed it, and at the time was entirely dethroned of reason, and specifically alleges that there was no consideration for the signing of the same at the date it was alleged to have been signed, and that the same is wholly without consideration, and never was executed by the defendant."

These allegations were denied by plaintiff's reply, and, upon the issues thus formed, a trial was had on December 14, 1910.

There was undisputed evidence to the effect that defendant signed the note sued on (and, according to plaintiff's testimony, this was in plaintiff's office with only himself and defendant present), and at the same time gave his personal check to the plaintiff for \$200, which check was paid. It further appears that there was no consideration for the same other than the then past-due indebtedness of the defendant to plaintiff's firm, known as Straughan Bros., evidenced by fifteen smaller notes made in 1901-3 for the aggregate principal sum of \$339.75 (on which \$58 interest had accrued) of which nine such notes in the aggregate principal sum of \$264.75 (on which \$26.09 interest had accrued) were then more than five years past due and, if not theretofore actually discharged, were subject to the bar of the statute of limitations, and six other such smaller notes in the aggregate principal sum of \$75 (on which \$31.91 interest had accrued) were not subject to such defense; but the plaintiff testified he did not remember the number of notes nor the denomination of any of them, nor what notes were surrendered in consideration of the note now sued on and the \$200 check, as he or his firm had had so many transactions

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with defendant, and had held other notes against him; and plaintiff was not more specific than herein stated as to such transactions. The defendant testified that on the occasion when he must have signed the note and check he spent two or three days in Arkansas City on a drunk, and did not remember when or where he signed them, nor any fact relating thereto, except that on his return home he found he had in his pocket the fifteen smaller notes mentioned, which, although he had made several prior payments, were all the notes ever surrendered to him; also that he was drunk at the time of signing some of these fifteen notes, and did not remember it. In answer to question as to what he was doing there, defendant testified he was trying to drink up all the whisky there, he "reckoned"; that that was all he remembered doing.

Joseph James testified that he accompanied defendant to Arkansas City on the occasion when it appears he signed the note sued on the check; that witness was with defendant during all his stay there, except about three-quarters of an hour, when he was getting his team in preparation for their return home, and defendant got drunk within half hour after arrival, and remained drunk during all the time he was there; that when he went for the team he left defendant at a store, and when he returned found him on the street at another place and helped him into the buggy, and left with him for home; that defendant was drunk enough to stagger and to require assistance to get into the buggy, and soon after they started home fell asleep and slept "for four or five miles," and while *en route* exhibited to witness a bundle of papers which witness then supposed was money, although the trial court did not permit this to stand as evidence; but this witness testified only in general terms as to being with defendant, and as to the fact that he was drunk before he was taken into the buggy for the start home, and was not questioned as to the transaction in which the note sued on and the check were signed.

The plaintiff further testified he went to defendant's home several times, specifying two such times, after the note sued on matured, and attempted to collect the indebtedness of the defendant; but defendant denied any such attempt, except that on one

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occasion plaintiff and his brother came to his home, and the following conversation occurred:

"He says: 'Bill, have you got any money for me?' And I said, 'No,' and his brother was with him, and his brother said something to me; he says, 'If you had money,' he says, 'you would give it to somebody else, wouldn't you?' 'Well,' I says, 'I don't know as I would.' I says, 'I don't know as I owe you anything,' I said to his brother, and that is about the only conversation we had there that day."

At the time the fifteen smaller notes were taken by Straughan Bros., this firm was engaged in selling "stock" and loaning money, and plaintiff, who was engaged in the banking business at the time of the trial in the court below, also was part owner of the Eagle Jewelry Store in Arkansas City, where Straughan Bros. then had their office, from which, together with his well-worded testimony and appearance on the witness stand, we cannot say but that it may have been inferred by the jury that he was a capable business man; and we cannot say but that it may have appeared to the jury that defendant, who was a resident of the Kaw Reservation, and could neither read nor write, except to write his name, was a very illiterate and incapable man in respect to business transactions. Fraud was not alleged against plaintiff; and no instruction was requested or given on the theory of either fraud or failure of consideration.

In considering this case, we must, in deference to the verdict and judgment in the trial court, assume as true every fact which the evidence for defendant reasonably tends to prove, including every reasonable inference deducible therefrom, in his favor, disregarding as not true all evidence for the plaintiff which is in conflict therewith; but, after doing this, the evidence seems barely sufficient to sustain the judgment. However, we cannot quite say that the judgment is without the support of any evidence in any essential particular. See *Swan v. Talbot*, 152 Cal. 143, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

Assuming that the jury found that the note and check were signed during the three-quarters of an hour when Joseph James left the defendant alone just before the start home; that the nine smaller notes had been paid or otherwise discharged before they became subject to the bar of the statute of limitation, though left

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in the hands of plaintiff; that there was no consideration for the \$475 note and the \$200 check except the six small notes aggregating the principal sum of \$75, with accrued interest amounting to \$31.95; that the defendant, an illiterate man, was wanting in business knowledge and capacity, even when sober, in explanation of his conduct when plaintiff called on him after the maturity of the \$475 note, and asked him if he had any money for him; and that the plaintiff was an experienced and capable business man, and yet made no reasonable attempt to explain the discrepancy between the apparent consideration given and the \$475 note and the \$200 check, nor to further elucidate the transaction, nor to meet derogatory evidence otherwise than indicated, although interrogated in that regard, and thus discredited and invited rejection of his own testimony (*Moore v First Nat. Bank, Iowa City*, 30 Okla. 623, 121 Pac. 626)—we cannot say but that there was some evidence from which the jury might have found that when defendant signed the \$475 note he was so destitute of reason as not to know the nature or consequences of his act, and therefore incapable of giving such assent as is requisite to the meeting of minds in an agreement which has the legal effect of an unavoidable contract.

In the case of *Coody v. Coody et al.*, 39 Okla. 719, 136 Pac. 754, it is in effect held that a person so destitute of reason as not to know the nature or consequences of his act, although such mental condition be the result of voluntary intoxication, cannot meet the mind of another in agreement, and is incapable of making a contract which is not voidable; and in that case the history and reasoning that have marked such defenses are reviewed, and the authorities are extensively cited.

The question as to whether defendant was in such incapacitating state of mind was apparently fairly submitted to the jury, in instructions to which no objections or exceptions were taken by the plaintiff; and, if there was error, the same was waived by failure to except, and cannot be considered here. Rev. Laws 1910, sec. 5003, and notes and citations; *Finch et al. v. Brown et al.*, 27 Okla. 217, 111 Pac. 391; *Taylor et al. v. Johnson et al.*,

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23 Okla. 50, 99 Pac. 645; *Carter & Bro. v. Missouri M. & L. Co.*, 6 Okla. 11, 41 Pac. 356; *Berry v. Smith*, 2 Okla. 345, 35 Pac. 579.

With plaintiff's motion for new trial, and as newly discovered evidence, there was an affidavit of one Daniel Bunnell, to the effect that defendant told affiant of his purpose to execute the note sued on before he did so, and about the time of the maturity of the same mentioned to affiant his desire and inability to pay it, and sought a loan of affiant for the avowed purpose of doing so; but, although plaintiff presented therewith his own affidavit, to the effect that he had no means of ascertaining the facts stated in the Bunnell affidavit in time to have availed himself of same at the trial, he did not negative the existence of facts which should have excited inquiry leading to discovery, nor otherwise state facts constituting due diligence to have made such timely discovery; and the motion for new trial was in this respect insufficient. *Rev. Laws 1910, sec. 5033, subd. 7, p. 1367, and notes; Burns v. Vaught*, 27 Okla. 711, 113 Pac. 906; *Wiers et al. v. Treese*, 27 Okla. 774, 117 Pac. 182; *Hobbs v. Smith et al.*, 27 Okla. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

SCOTT et al. v. McGIRTH.

No. 3102. Opinion Filed February 28, 1914.

(139 Pac. 519.)

1. **COURTS—Transfer of Jurisdiction of Territorial Court—Proceedings to Set Aside Will.** A proceeding to probate a will pending in the United States Court at Wewoka, at the time of the admission of the state into the Union, which was transferred to the district court of Seminole county, and by such court transferred to the county court of Seminole county, and by that court transferred to the county court of Hughes county, and was pending in said last named court when a petition to set aside the probate of the will was filed; held, that the county court of Hughes county is the successor in probate matters of the United States Court for the Western District of the Indian Territory, and the proper court in which to file a petition to set aside the probate of a will, probated in the United States Court for the Western District of the Indian Territory, at Wewoka.

Statement of Facts.

2. **SAME—Jurisdiction—Probate Matters.** A county court coextensive with the county is a court of original jurisdiction in all probate matters.
3. **SAME—Transfer of Jurisdiction—Records and Files.** The courts of original jurisdiction in this state are deemed to be the successors of all courts of original jurisdiction of the territories, and as such take and retain custody of all records, documents, journals, and files of such territorial courts.
4. **WILLS — Contests — Infants—Diligence—Statutes.** In construing section 5166, Comp. Laws 1909 (Rev. Laws 1910, sec. 6219), as applied to infants and persons of unsound mind, said section must be read and construed in connection with section 5172, Comp. Laws 1909 (Rev. Laws 1910, sec. 6225), and when so read and construed it seems clear that the latter section relieves an infant of the diligence required of adults, under section 5166, to contest the probate of a will within one year, or to show that the evidence relied upon was discovered since the probate of the will. Section 5172 gives an infant a right to contest the probate of a will upon either or all of the four grounds specified in said section 5166, free from conditions precedent in respect to diligence specified in said last section.
5. **SAME—Proceeding to Set Aside Probate of Will—Objections.** Where a petition to set aside the probate of a will, under section 5166, *supra*, Comp. Laws 1909, is neither signed nor verified, the remedy is by motion to strike the petition from the files, and not by general demurrer.
6. **SAME—Appeal—Objection Below.** An objection for want of signature or verification to a petition to set aside the probate of a will cannot be raised for the first time on appeal.

(Syllabus by Rittenhouse, C.)

*Error from District Court, Hughes County;
John Caruthers, Judge.*

Action by Lena McGirth, by her guardian, Felix P. Canard, against Evans Scott and Alexander M. Butts. Judgment for plaintiff overruling demurrer, and defendants bring error. Affirmed.

The plaintiffs in error filed in the United States Court for the Western District of the Indian Territory, at Wewoka, a will, purporting to be the last will and testament of Mongy McGirth, deceased, who died at Holdenville, Ind. T., on the 17th day of June, 1910, in what is now Hughes county, Okla. The will was probated, and the plaintiffs in error were appointed executors under said will. Wewoka was the nearest town to the

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place of the death of the said Mongy McGirth where a United States Court was held. After statehood the cause was transferred to the district court of Seminole county, Okla., and from that court to the county court of Seminole county, and from said court of Seminole county to the county court of Hughes county, Okla. The defendant in error filed a petition to set aside the probate of the alleged will of Mongy McGirth in the county court of Hughes county, Okla., the date of which does not appear from the records, which petition alleges that Felix P. Canard is the legally appointed and acting guardian of Lena McGirth, an infant of the age of four years, and that the infant is the only surviving child of Mongy McGirth, deceased; that the said Mongy McGirth was a full-blood Creek Indian and a citizen of the Creek Nation, and died some time in the month of June, 1907, in what is now Hughes county, state of Oklahoma, and left surviving him his widow and Lena McGirth, an only child; that a very short time before the death of Mongy McGirth a paper was executed, signed, and witnessed, which pretended to be the last will and testament of the said Mongy McGirth; that the said pretended will was afterwards filed and admitted to probate in the United States Court for the Western District of the Indian Territory, at Wewoka; that the said Mongy McGirth by said pretended will altogether disinherited his wife, and deprived her of her dower interest in said estate, and left but a small portion of said property to Lena McGirth, his only child, and left the bulk of his property to Evans Scott and Alexander M. Butts, both white men, strangers to him in blood, and who were his physicians attending him in his last sickness at the time the said pretended will was made; that at the time the said pretended will was made the said Mongy McGirth was on his death bed, and was so worn out with pain and suffering that he was incapable of transacting any business whatever, was *in extremis*, and wholly lacking in testamentary capacity; that the said pretended will was made while the said Mongy McGirth was under duress of the said plaintiffs in error, and was obtained by them through duress, undue influence, and fraud; that the said pretended will was prepared by the said plaintiffs in error of their

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own volition, and was not dictated or suggested by the said Mongy McGirth; that the same was not read over to him before his pretended signature or mark was affixed thereto; that there was no one present who could read the said will in English, and interpret the same to Mongy McGirth in Creek, and that the said Mongy McGirth could neither talk nor understand the English language, and that he had no knowledge whatever of the contents of the said pretended will, and that said pretended will was signed and witnessed at the earnest solicitation and request of the said plaintiffs in error for the purpose of obtaining the property of the said Mongy McGirth, and depriving his wife and child of same; that said pretended will was not executed in accordance with the laws then in force in the Indian Territory as to the making and execution of wills, and could not vest any rights of property in the devisees therein named; and prays that the will be revoked and canceled, and held for naught, and that the probate of same be set aside.

This petition was not signed or sworn to, nor was any motion to dismiss for that reason ever filed. The plaintiffs in error filed a demurrer, which was by the court overruled, and exceptions allowed, and the case is brought here for review on transcript.

Warren & Miller, for plaintiffs in error.

B. T. Buchanan, W. W. Witten, and B. N. Hicks, for defendant in error.

Opinion by RITTENHOUSE, C. (after stating the facts as above). The first question raised by the demurrer is "that the court has no jurisdiction of the subject-matter of the action, in that it affirmatively appears from the face of the petition that the said will was probated in the United States Court for the Western District of the Indian Territory, sitting at Wewoka, Ind. T., and therefore this court has no jurisdiction to try said petition for revocation under the law." It is argued very extensively that the county court of Hughes county is not the successor of the United States Court for the Western District of the Indian Territory in probate matters, and therefore the contest in this

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cause was not filed in the court in which the will was proved, as required by section 5166, Comp. Laws 1909 (Rev. Laws 1910, sec. 6219). The will was probated in the United States Court at Wewoka, and after statehood the cause was transferred to the district court of Seminole county under section 27 of the Schedule of the Constitution, which provides:

"All cases, civil and criminal, pending, at the time of the admission of the state into the Union, in the district courts of the territory of Oklahoma, in any county within the district, and the records, papers, and proceedings of said district court, and the seal and other property appertaining thereto, shall be transferred into the district court of the state for such county, except as is provided in the Enabling Act of Congress, and all cases, civil and criminal, pending, at the time of the admission of the state into the Union, in the United States Court for the Indian Territory, within the limits of any county created in whole or in part within the limits of what was heretofore the Indian Territory, and all records, papers, and proceedings of said United States Courts for the Indian Territory, and the seal and other property appertaining thereto, shall be transferred to the district court of the state for such county, except as is provided in the Enabling Act of Congress and the amendments thereto: Provided, that the Legislature may provide for the transfer of any such cases from one county to another county."

Afterwards the district court of Seminole county transferred said cause to the county court of the same county, under section 23 of the Schedule of the Constitution, which provides:

"When this Constitution shall go into effect, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration and guardianship, and other matters pending therein, shall be transferred to the county court of such county, except of Day county, which shall be transferred to the county court of Ellis county, and the county courts of the respective counties shall proceed to final decree or judgment, order, or other termination in the said several matters and causes as the said probate court might have done if this Constitution had not been adopted. The district court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, shall transfer to the county court of such county all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating

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to estates: Provided, that the Legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed."

Under the provisions of section 27, *supra*, of the Schedule, the Legislature of Oklahoma passed the following act:

Section 536, Comp. Laws 1909:

"That all those civil cases transferred from the courts of the territory of Oklahoma and the United States Courts in the Indian Territory to the courts of this state, as transferred by acts of Congress and accepted by the Constitution, which would have been properly triable in any court, or county or district of this state, had such suit or proceeding been commenced after the admission of this state into the Union, including records formerly belonging to the United States Commissioners' Courts and all papers of mayors of cities and incorporated towns having and exercising *ex officio* jurisdiction as United States Commissioners in that part of the state formerly known as Indian Territory, that may be in the hands of the clerks of the various district courts of that portion of the state may, including probate matters, by any person having a substantial interest therein, on petition verified by the affidavit of the applicant or his attorneys of record, filed with the judge or clerk of the court where such cause is pending within sixty days after the passage and approval of this act, be transferred to the proper courts of such county or district, and that all books, records, pending cases, papers, proceedings, liens, judgments and executions pending in a justice of the peace court of any county are hereby transferred to some justice of the peace court of the county in which if originally brought in said court, the defendant lives, or if the defendant be a nonresident, then to the county where the plaintiff lives, or the defendant has property, and when such records are transferred as above provided for, said court shall have full and complete jurisdiction of all cases and proceedings so transferred."

Again, the Legislature of Oklahoma provided by Sess. Laws 1910, c. 25, p. 37, as follows:

"Section 1. When it is made to appear that any probate matter pending in any court of this state which, by acts of Congress and the Constitution, was transferred from the courts of the territory of Oklahoma and the United States Courts in the Indian Territory to the courts of this state, is not in the county where the venue of such suit, matter or proceeding would lie if

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arising after the admission of this state into the Union, the court where such suit, matter or proceeding is pending shall, upon the application of the guardian, executor or administrator, or any other person having a substantial interest therein, or upon his own motion, when a proper showing has been made for a removal, within twenty days after application is made therefor, make an order transferring such suit, matter or proceeding to the county where the venue would properly lie if such suit, matter or proceeding had arisen since the admission of this state into the Union, by transmitting to such county the original papers, together with certified copy of all orders and judgments, upon the payment of all accrued costs.

"Section 2. All transfers of records, suits or proceedings of a probate nature which, by acts of Congress and the Constitution, were transferred from the territory of Oklahoma and the United States Courts in the Indian Territory to the courts of this state, and thereafter transferred to another county, where such county would have been the proper venue for such suit, matter or proceeding, been commenced after the admission of such state into the Union, be and the same are hereby legalized, and no sale or other proceeding by the court to which such suit, matter or proceeding has been transferred shall be void because of such transfer."

By this legislation the cause before us was transferred from the United States Court of the Western District, Ind., T., sitting at Wewoka, to the county court of Hughes county, and the same was pending in said last-named court when the remedial statute of 1910 (chapter 25, p. 37) was passed.

Under section 19 of the Enabling Act (Act June 16, 1906, c. 3335, 34 St. at L. pt. 1, p. 277), it is provided:

"That the courts of original jurisdiction of such state shall be deemed to be the successor of all courts of original jurisdiction of said territories and as such shall take and retain custody of all records, dockets, journals, and files of such courts except in causes transferred therefrom, as herein provided."

Section 3 of the Act of Congress approved March 4, 1907 (34 St. at L. 287, c. 2911), provides:

"That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States Courts, in the Indian Territory, at the time said territories become a state, not transferred to the United States Circuit or District Courts in the state of Oklahoma, shall be pro-

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ceeded with, held, and determined by the courts of said state, the successors of said district courts of the territory of Oklahoma. * * *

It was the intention of Congress by the provisions of the Enabling Act to have the causes pending in the territorial courts transferred from those courts of original jurisdictions to the state courts of original jurisdictions. The district court of Seminole county did not have original jurisdiction in probate matters, but only appellate jurisdiction, and had no authority to continue to administer upon matters arising in this cause, except as the same might come into that court by appeal from the county court. Section 2 of the act of the Legislature of June 4, 1907 (Sess. Laws 1907-08, p. 284, c. 27, art. 1), provides: "An act to define the jurisdiction and duties of county court, and to fix compensation for the judges thereof," etc., providing that "the county court, coextensive with the county, shall have original jurisdiction in all probate matters." This last act is merely declaratory of section 12, art. 7, of the Constitution, which confers original jurisdiction in all probate matters upon the county court, and, as in probate matters the county court of the state corresponds in original jurisdiction to the United States Courts of the Indian Territory, they became, as to all probate matters, the successor of the United States Court.

Whether the proper proceedings were taken to transfer this cause to the county court of Hughes county or not is immaterial, as the Legislature of 1910 legalized all transfers of records of a probate nature which were transferred from the United States Court in the Indian Territory to the courts of this state. This case was pending in the county court of Hughes county when the remedial legislation was passed.

Hughes county, Okla., being the proper venue for the probate of the will of Mongy McGirth, deceased, and the cause having been transferred to that court, and the transfer legalized, we think that the petition to set aside the probate of the will was filed in the right court, and that no other court in the state had jurisdiction to try said cause. While the exact question has not been decided by our courts before, yet the theory has

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been well advanced in the following cases: *Eaves v. Mullen*, 25 Okla. 679, 107 Pac. 433; *MaHarry v. Eatman*, 29 Okla. 46, 116 Pac. 935; *Burdett v. Burdett*, 26 Okla. 416, 109 Pac. 922, 35 L. R. A. (N. S.) 964. In the last case the court says:

"That the county court of McIntosh county was the successor in matters probate pending in the United States Court for the Indian Territory, Western District, on the advent of statehood, we consider no longer an open question in this jurisdiction, having been squarely passed on by this court in *Eaves v. Mullen*," *supra*.

The next ground of the demurrer is that "the petition does not state facts sufficient to constitute a cause of action, in that it is nowhere alleged that the matter set up in the said petition as grounds for revocation of the said will consist of or are based upon evidence discovered since the probate of the said will, and for the further reason that it affirmatively appears from the face of the said petition that more than one year elapsed between the probate of the said will and the filing of the petition for revocation, and that Lena McGirth has not yet reached her majority." We think that the trial court properly overruled this section of the demurrer. The statute provides (section 5166, Comp. Laws 1909 [Rev. Laws 1910, sec. 6219]):

"When a will has been admitted to probate, any person interested therein may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will, the material facts of which must be set forth, shows: 1. That a will of a later date than the one proved by the decedent, revoking or changing the former will, has been discovered, and is offered; or, 2. That some jurisdictional fact was wanting in the former probate; or, 3. That the testator was not competent, free from duress, menace, fraud, or undue influence when the will allowed was made; or, 4. That the former will was not duly executed and attested."

The foregoing section must be construed in connection with section 5172, Comp. Laws 1909 (Rev. Laws 1910, sec. 6225), when applied to infants and persons of unsound mind:

"Section 5172: If no person, within one year after the probate of a will, contests the same or the validity thereof, the pro-

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bate of the will is conclusive, saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed."

Sections 5166 and 5172, *supra*, must be read and construed together, and when so read and construed it seems clear that the latter section relieves an infant of the diligence required of adults under section 5166, *supra*, to contest the probate of a will within one year, or to show that the evidence relied upon was discovered since the probate of the will. In other words, section 5172, *supra*, gives an infant a right to contest the probate of a will upon either or all of the four grounds specified in said section 5166, *supra*, free from conditions precedent in respect to diligence specified in said last section. The defendant in error has complied fully with sections 516 and 5172, *supra*, having set forth in writing the material allegations complained of, and that the testator was not competent, free from duress, menace, fraud or undue influence, when the will was made, and that the will was not duly executed and attested.

In the case of *Powell v. Koehler*, 52 Ohio St. 119, 39 N. E. 196, 26 L. R. A. 483, 49 Am. St. Rep. 708, the Supreme Court of Ohio says:

"Persons within the saving provisions of the statute are not precluded from suing while the disability lasts. The time within which they may sue is simply extended for a definite period after the disability ceases, and when it ceases they stand upon the same footing as other persons. The statute begins to run against them from that time, and, once started, nothing can prevent the bar but suit brought within the prescribed period. The rule which is generally maintained in this country was announced by Lord Talbot, in *Belch v. Harvey*, 3 P. Wms. 287, note, in the following language: 'The persons who are the subject of the proviso are not disabled from suing; they are only excused from the necessity of doing it during the continuance of the legal impediment; therefore, when that difficulty is removed, the time allowed for their further proceeding should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms on which such excuse was given?'"

In the case of *Whirley v. Whiteman*, 38 Tenn. (1 Head) 610, it is said:

"A person injured when three years of age may elect to sue by *prochein ami* at any time during minority, or alone within a year after majority."

See, also, *Mo. P. Ry. Co. v. Cooper*, 57 Kan. 188, 45 Pac. 587; *Tinsley v. Pitts*, 10 Kan. App. 321, 69 Pac. 536; 3 Bates on Pleading, p. 2966; *Samson v. Samson*, 64 Cal. 327, 30 Pac. 979.

The plaintiffs in error have relied for a construction of section 5172, *supra*, on the case of *Holland v. Beaver*, 29 Okla. 115, 116 Pac. 766, Ann. Cas. 1913A, 814, which was a case construing section 6082, Comp. Laws 1909 (Rev. Laws 1910, sec. 5255). This case is not applicable to the one at bar, as the section under consideration in that case specifically excluded the time of such disability within which the infant could institute the proceedings under that section, while section 5172, *supra*, does not contain such limitation.

Under this same section of the demurrer it is contended that it affirmatively appears from the face of the petition that more than one year has elapsed between the probate of the will and the filing of the petition for revocation. This question was disposed of under the first section of this clause of the demurrer; we desire to say in addition, however, that the record does not show the date when the will was probated, nor does it show when the petition to set aside the probate of the will was filed in the county court of Hughes county, and, even if we desired to consider this question further, we could not do so under the condition of the record.

The last question raised by the demurrer is that the petition does not state facts sufficient to constitute a cause of action. This searches the entire petition, and, if the petition states one sufficient ground for relief, the demurrer should be overruled. We are satisfied from an examination of the petition that the contestant has come within subdivisions 3 and 4 of section 5166, Comp. Laws 1909 (Rev. Laws 1910, sec. 6219):

"3. That the testator was not competent, free from duress, menace, fraud or undue influence when the will allowed was made; or, 4. That the former will was not duly executed and attested."

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The petition shows that Mongy McGirth was a full-blood Creek Indian, and left surviving him a widow and one child; that the will was made disinheriting the wife, and leaving but a very small portion of his property to his only child, and it left the bulk of the estate to Evans Scott and Alexander M. Butts, strangers to him in blood, who were occupying towards the deceased at the time the confidential relation of physician and patient, and, while occupying this confidential relation, and while the said Mongy McGirth was on his death bed, and *in extremis*, and wholly lacking in testamentary capacity, procured the said will, which they made and prepared of their own volition and suggestion, disinheriting the said wife, and leaving but a small portion of his property to Lena McGirth, his only child, and that said will was not read over to the deceased, nor could he either talk or understand English, nor had he any knowledge whatever of the contents of the said will—all of which constitutes a sufficient allegation to come within subdivision 3 of section 5166, *supra*; that the deceased was not competent, free from duress, menace, fraud, or undue influence when the said will was executed. *Estate of Crozier*, 65 Cal. 19, 4 Pac. 412.

The allegation in plaintiff's petition that said pretended will was not executed in accordance with the laws then in force in the Indian Territory as to the making and execution of wills, and could not vest any rights of property in the devisees therein named, is a sufficient allegation under subdivision 4 of section 5166, *supra*.

"In a bill contesting the validity of a will an allegation 'that said will was not duly executed' is sufficient." (*Barksdale et al. v. Davis et al.*, 114 Ala. 623, 22 South. 17.)

The other point raised by plaintiffs in error is that the petition was not signed or verified as required by section 5166, *supra*. We cannot agree with plaintiffs in error on this question. Had they filed a motion to strike the petition for the want of signature or verification, the same no doubt would have been sustained by the trial court; but they did not elect to do so, but filed a general demurrer, which does not raise this question. The question as to the signing and verification of a petition can-

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not be raised for the first time on appeal in this court. *Warner v. Warner*, 11 Kan. 122; *Gilmore v. Hempstead*, 4 How. Prac. (N. Y.) 153; *Fritz v. Barnes et al.*, 6 Neb. 435; *Toledo Agricultural Works v. Work*, 70 Ind. 253; *State ex rel. Ruhlman v. Ruhlman, Executrix*, 111 Ind. 17, 11 N. E. 793; *Payne, Huntington & Co. v. Flourney*, 29 Ark. 500; 8 Ency. Pleading and Practice, 206.

There being no error, the case should be affirmed.

By the Court: It is so ordered.

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No. 3103. Opinion Filed February 28, 1914.

(139 Pac. 306.)

1. **DEATH—Presumption—Evidence of Absence.** G., whose age at the time is not shown, but who was a mere youth, left his home in Kentucky, going to Texas. At the time of his departure he left a brother four years his junior, an inmate of an orphans' home. Upon reaching eighteen years of age, G. returned to his former home in Kentucky, where he spent three days trying to get word of his brother, but failed. It is not shown that the brothers had ever corresponded with each other, or that the younger knew of the elder's whereabouts. The year previous to the brother's return, the yellow fever had visited the locality of the orphans' home, causing a number of deaths. It was not proven for what length of time the younger brother remained in the orphans' home, or whether he was an inmate thereof on the visit of the pestilence, nor did it appear of whom inquiry was made, or the extent thereof. **Held**, the facts proved were insufficient to raise the presumption of death, arising from an absence from home, unheard from, for a period of seven years.
2. **SAME—Essential Basis.** In order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death, arising from seven years' unexplained absence from home or place of residence, there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry.
3. **SAME.** The inquiry should extend to all those places where information is likely to be obtained, and to all those persons who in the ordinary course of events would be likely to receive tidings if the party were alive, whether members of his family or not; and, in general, the inquiry should exhaust all patent sources of information, and all others which the circumstances of the case suggest.

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4. **SAME—Presumption—Nature and Extent.** The presumption of death is one that generally is applied only to those who were absentees from their home; but does not authorize such absent person or persons to presume, therefore, that any one of those remaining at the place which he or they have left has died.
5. **SAME.** With even greater force should the rule last announced be confined in the case of those of tender years, such as the separation of two brothers during their boyhood days.
6. **DESCENT AND DISTRIBUTION—Presumption of Heirship.** It is a presumption of law that a person dying intestate has left heirs capable of succeeding to his estate.

(Syllabus by Sharp, C.)

*Error from District Court, Bryan County;
Summers Hardy, Judge.*

Action by Margaret Ghromley, administratrix of the estate of Christopher F. Green, deceased, against the Modern Woodmen of America. Judgment for plaintiff, and defendant brings error. Reversed.

Truman Plantz, Geo. L. Bowman, and Geo. G. Perrin, for plaintiff in error.

Utterback, Hayes & MacDonald, for defendant in error.

Opinion by SHARP, C. The benefit certificate, on which plaintiff's action was brought, was issued by defendant to Christopher F. Green, March 17, 1908, and was made payable, in case of his death while a beneficial member of said society in good standing, to his beneficiary or beneficiaries, to wit, his legal heirs. The assured died November 23, 1909, while in good standing in said society. Neither the plaintiff, Margaret Ghromley, nor her sisters, Louisa Halley and Mary Elizabeth Halley, were related to the assured other than it was claimed they were each members of the family of said Christopher F. Green, and had lived with him as members of his family for many years, and had been during said time, and were at the time of his death, each and all dependent upon him for a livelihood and support.

The by-laws of defendant society, among other provisions, contained the following:

"Benefit certificates shall be made payable only to the wife, surviving children or some other person or persons specifically named in said benefit certificate as beneficiary, who are related to the member as heir, blood relative, or person dependent upon him, or member of his family, whom the applicant shall designate in his application."

And the by-laws further specifically provided that no payment should be made upon any benefit certificate to any person who did not bear to the assured, at the time of his death, the relationship, either of wife, surviving child, heir, blood relative, or person dependent upon, or member of, the family of the member. Thus it will be seen that while persons dependent upon a member of the society, or who were members of his family, were eligible as beneficiaries, the by-law named further provided that they must be specifically mentioned in the certificate as such beneficiaries. The controlling statute at the time governing beneficiary associations in this state (section 3889, Comp. Laws 1909) provided that payment of death benefits should be to the families, heirs, blood relatives, affianced husband or wife of, or to persons dependent upon, the member.

Plaintiff's action was predicated upon the theory that at the time of the death of Christopher F. Green he had no legal heirs, and that plaintiff and her two sisters, being persons dependent upon, and members of, the assured's family, were entitled to the proceeds of the beneficiary certificate, in pursuance of the by-law above quoted.

The three principal grounds upon which a reversal of the judgment below is urged, are: (1) That the administratrix was not entitled to sue; (2) that there was no sufficient evidence of the death of Christopher F. Green's brother; (3) that Margaret Ghromley and her sisters were not, in any event, legal beneficiaries under the beneficiary certificate. Our conclusions render unnecessary a determination of the first proposition, and the remaining questions will be considered together.

The application for membership and benefits in the defendant society, signed by the assured on February 20, 1908, as already observed, named as the beneficiaries the assured's legal heirs. In answer to numerous questions contained in the application, the

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assured stated that he had a living brother, age 39 years, whose then condition of health was good. It was not shown whether he had any living uncles or aunts, or more distant kindred, and the only proof offered as to the death of the brother was the testimony of Margaret Ghromley, concerning statements made to her by the deceased during his lifetime, which testimony is both meager and unsatisfactory. From it we gather that when Christopher F. Green was about 21 years of age he came from somewhere in the state of Texas to the home of the plaintiff, her sisters, and then living brother, at the time residing in said state, and thereafter continued to make his home with them, first in Texas, and afterwards in what is now Oklahoma, until the day of his death 24 years thereafter; that Green had told her that when he left his home in Kentucky he left a younger brother in an orphans' home; that he went off and stayed until he was eighteen, when he returned and spent about three days trying to get word from his brother, but failed; that he found out the yellow fever had visited that locality the year before, and he guessed his brother had died, as many other persons had. Treating this testimony as competent, and though contradicted by Green's application, stating that his only brother was living and in good health, was it sufficient to raise the presumption of death arising from an absence of seven years? According to the signed application, the assured was 43 years of age at the time of the issuance of the beneficiary certificate; his brother four years younger. There is no evidence as to Green's age when he left home and went to Texas, but only that he went off and stayed until he was eighteen, when he returned. It is not shown that during his absence he ever wrote to or received letters from his younger brother, or that any form of communication, either between the brothers or others concerning them, passed during said absence. It does not appear that upon his return he made any inquiry as to whether his brother had left the orphans' home, and, if so, when, and to what place he had gone, though it may fairly be inferred that some such information was obtainable, for the testimony is that the yellow fever had visited that locality only the year before. In fact the extent of his inquiry does not appear to have been

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made the subject of inquiry further than stated. If living at the time, the younger brother would have been fourteen years of age. Had it been shown that he continued to be an inmate of the orphans' home, and was such an inmate on the occasion of the pestilence named, the presumption of death would be greatly strengthened.

It is a rule of common law that a person shown not to be heard of for seven years by those, if any, who, if he had been living, would naturally have heard of him is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of, without assuming his death. Jones on Evidence, sec. 61.

The origin and growth of this rule of presumption is learnedly treated in Thayer's Preliminary Treatise on Evidence at Common Law, pages 319 to 324, where in part it is said:

"It is a rule of presumption that, in the absence of evidence to the contrary, a person shall be taken to be dead when he has been absent seven years and not heard from. This is a modern rule. It is not at all modern to infer death from a long absence; the recent thing is the fixing of this time of seven years, and putting it into a rule. The faint beginning of it, as a common-law rule, of general application in all questions of life and death, is found, so far as our recorded cases show, in *Doe, d. George v. Jesson* (6 East, 80) in January, 1805. Long before this, in 1604, the Bigamy Act of James I had exempted from the scope of its provisions, and so from the guilt and punishment of a felon (1) those who had married a second time when the first spouse had been beyond the seas for seven years, and (2) those whose spouse had been absent for seven years, although not beyond the seas, * * * 'the one of them not knowing the other to be living within that time.'"

The extension of the rule, as well as its limitations, is interestingly treated in the subsequent pages of the above authority, as well as in Lawson, Law of Presumptive Evidence, pp. 246-286, and Chamberlayne's Modern Law of Evidence, pp. 1090-1118. In this country the rule has generally been applied to those who are absentees from their home.

As was said in *Hyde Park v. Canton*, 130 Mass. 505:

"If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law

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authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died."

In Chamberlayne's *Modern Law of Evidence*, sec. 1096, we find the following statement of the rule:

"The presumption of death being based upon an inference of fact that the persons will naturally communicate with their homes, it may be premised that in certain contingencies, where these facts are not shown to exist, the rule of law does not come into operation; for example, it is of no special significance that one who has left home, and is of parts unknown, has failed to hear from or about those whom he has left there."

In other words, under such circumstances the expiration of seven years without tidings gives rise to no presumption of law that the person at home is dead.

In the case at bar, an orphan boy left his home in Kentucky, leaving a brother four years younger an inmate of an orphans' home. The record is silent as to whether the latter knew of the whereabouts of the older brother, or ever wrote to, or attempted to communicate with him. Defendant in error, upon whom rests the burden of establishing that Christopher F. Green died leaving no heirs at law, must recover (if she can do so in any event) upon proof of a state of facts from which the law will fix a presumption of death.

Ordinarily, where it is sought to fix the presumption of death upon one who is absent from home, there must be proof of inquiry made of the persons and at the places where news of him, if living, would most probably be had. 2 *Greenleaf on Evidence* (16th Ed.) sec. 278; *Chamberlayne, Modern Law of Evidence*, secs. 1100, 1101; 2 *Wharton on Evidence*, sec. 1274; *Posey v. Hanson*, 10 App. D. C. 496; *Wentworth v. Wentworth*, 71 Me. 72; *Flynn v. Coffey*, 12 Allen (Mass.) 133; *Shriver v. State*, 65 Md. 278, 287, 4 Atl. 679. In *Wentworth v. Wentworth*, *supra*, it is noted that it must appear that the absent one had not been heard of by those persons who would naturally have heard from him during the time that he had been living. But it was ob-

served that the rule did not confine the intelligence to any particular class of persons. It may be to persons in or out of the family.

2 Greenleaf on Evidence (16th Ed.) sec. 278f, after stating the circumstances material to the issue, such as age, situation of the party against whom the presumption is directed, his habits, employment, state of health, physical constitution, as well as the place or climate of the country whither he went, facilities for communication, habit of correspondence, or other circumstances tending to aid the jury in determining the fact of life or death, says:

"There must also be evidence of diligent inquiry at the place of the person's last residence in this country, and among his relatives, and any others who would probably have heard of him, if living."

Sustaining the foregoing text are the following cases: *Bailey v. Bailey*, 36 Mich. 181; *State v. Teulon*, 41 Tex. 249; *In re Smith's Estate*, 77 Misc. Rep. 76, 136 N. Y. Supp. 825; *City of Litchfield v. Kcagy*, 78 Ill. App. 398; *Sommerville v. Aetna Life Ins. Co.*, 21 Ont. L. Rep. 276, 16 Ont. W. R. 301; Lawson on the Law of Presumptive Evidence, sec. 264 *et seq.*

In *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068, it was announced by Mr. Justice Phillips that, in order to enforce the presumption of the death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence and among his relatives, and any others who would probably have heard from him, if living. In *Modern Woodmen of America v. Gerdorn et al.*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809, many authorities are gathered in a footnote. In the opinion it was held that the inquiry should extend to all those places where information is likely to be obtained, and to all those persons who, in the ordinary course of events, would be likely to receive tidings if the party were living, whether members of his family or not; and, in general, the inquiry should exhaust all competent sources of information, and all others which the circumstances of the case suggest. In *Renard et al. v. Bennett et al.*, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas.

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240, the same court held that the inference of death, to be derived from the unexplained absence of a person from his home for a period of seven years, is, at best, only a presumption, and it cannot arise unless the absence remains unexplained after diligent inquiry is made of the persons, and at the places, where tidings of the person, if living, would most probably be.

In Mississippi a statute created a presumption of death of any person from seven years' absence without being heard of, and it was held in *Manley v. Pattison*, 73 Miss. 417, 19 South. 236, 55 Am. St. Rep. 543, that the words "any person" referred only to persons having volition and the right of free locomotion, and did not create the presumption of death of children, incapable, by reason of their tender years, of absenting themselves from the state, or of concealing themselves within it. While the case is perhaps not directly in point, it tends to indicate the distinction that should exist, in the case of the absence of those of tender years, from the general rule applicable to adults.

In *Re Miller's Estate* (Sur.) 9 N. Y. Supp. 639, a woman eighteen years of age, illiterate, with vicious propensities, and abandoned by her parents when quite young, escaped from an orphan asylum in which she was confined, and it was held that no presumption of death arose from the fact that she had failed to answer advertisements inserted in various newspapers, and that for more than seven years since her escape all trace of her whereabouts had been lost. It was said that the presumption of death did not arise where it was improbable there would have been any communication with home.

If the orphans' home, or the locality in which it was situated, continued to be the asylum of the assured's brother, and if in fact he was not there on the occasion of the assured's visit, it is not shown, neither was an attempt made to prove, that he had been absent therefrom for the period of seven years; hence there is an absence of facts necessary to give rise to the presumption of death.

Not only was the proof insufficient to establish the presumption of death of the assured's brother, but it failed to show that there were no other living heirs at law. It has been said that it

is to be presumed that a person, proved to be dead, left heirs. Lawson, Law of Presumptive Evidence, pp. 249, 250; *Harvey v. Thornton*, 14 Ill. 217. Section 46 of the by-laws of the defendant society provided that if the death of the beneficiary of any member should occur prior to the death of the member, or in event of the disqualification of the beneficiary named, if such member should fail to have another beneficiary named, as provided in another section of the by-laws, then the amount to be paid under the benefit certificate should be paid to the surviving beneficiaries, if any there were. Or if no beneficiary survived, then to the widow; if no widow, to the children; if no children, to the mother; if no mother, to the father; if no father, to the brothers and sisters; if no brothers and sisters or child of any deceased brother or sister, then to the next of kin, who would be the distributees of the personal estate of the member upon the death of the intestate, according to the laws of the state where the said member resided at the time of his death. So that in no event is provision made for the plaintiff, or either of her sisters, even though of the designated class, not having originally or subsequently been named as beneficiaries, according to the by-laws of the society. Counsel for defendant in error admit that claimants do not come within any of the classes named in the foregoing by-law, and their insistence is that they can recover in virtue of the fact of the absence of any of the persons above designated. Even though the position be correct (a question not necessary to be decided) plaintiff, upon whom rested the burden of proof upon this issue, failed to prove that there were no living heirs, hence for that reason alone she is not entitled to recover. The first duty imposed upon those intrusted with the management of the affairs of fraternal benefit societies is to sacredly guard its funds that the benevolent purposes of the organization may be discharged. In section 3 of the Constitution of the plaintiff in error, of 1908, it is said that the purposes of said organization shall be the affording of substantial benefits to, and promoting of fraternal relations among, its members during life, and the furnishing of financial aid and indemnity to the beneficiaries of beneficial members after death. Had the as-

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sured desired, and the facts warranted, claimant and her sisters could have been named either as original or substitute beneficiaries, but he saw fit not to do so, but instead to name his legal heirs as beneficiaries.

From what has been said, it is obvious that the learned trial judge erred in rendering judgment for the plaintiff. The judgment of the trial court should therefore be reversed.

By the Court: It is so ordered.

MINNETONKA LUMBER CO. *et al.* v. BOARD OF
EDUCATION OF CITY OF SAPULPA.

No. 3119. Opinion Filed February 28, 1914.

(139 Pac. 384.)

MECHANICS' LIENS—Property Subject—Public Property. Neither the public buildings nor the land upon which same are situated, whether owned by the state or any subdivision thereof, are subject to the lien authorized by section 4527, St. Okla. 1893 (section 3862, Rev. Laws 1910), as such lien would be against public policy and unenforceable, and such property is not by statute expressly made subject to same.

(Syllabus by Thacker, C.)

Error from District Court, Creek County;
W. L. Barnum, Judge.

Action by the Minnetonka Lumber Company, a corporation, on account for material furnished and for foreclosure of materialman's lien against Emmet Brunson, as debtor, the Board of Education of the City of Sapulpa, Okla., a corporation, as owner of property against which lien was claimed, and the Spurrier Lumber Company, a corporation, as claimant of a like debt and lien, for which it filed cross-petition against said Brunson and said Board of Education. Judgment against Emmet Brunson, who does not appeal, and as to the Board of Education, against the Minnetonka Lumber Company and the Spurrier Lumber Company on their claims of liens as to major portion of Brunson's debt, from which they bring error. Affirmed.

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C. F. McMullan and W. R. Cowley, for plaintiffs in error.

W. Morris Harrison and Mars, Burke & Harrison, for defendant in error.

Opinion by THACKER, C. This is an action by one of the plaintiffs in error (the Minnetonka Lumber Company) for a personal judgment against Emmet Brunson, as debtor, in the sum of \$502.85, and against defendant in error, as alleged owner of two acres of land upon which said Brunson, using material furnished to him by plaintiff, and thus giving rise to such debt, constructed a public school building (said land and building owned by defendant in error for public school purposes), under contract with defendant in error, for which he received \$1,425 from the latter as full compensation, except \$75 still owing, after plaintiff in due form had filed its claim of lien against said property as security for said debt under section 4527, St. Okla. 1893, as amended by L. 1895, p. 316, the same, with further amendment immaterial here, being section 3862, Rev. Laws 1910; the other plaintiff in error (the Spurrier Lumber Company) being also named as a defendant in the trial court and, with its answer admitting the allegations of plaintiff's petition, filing a cross-petition similar to plaintiff's petition, for personal judgment against said Brunson for \$1,711.60 and for foreclosure of a like lien claimed against defendant in error.

Each of the plaintiffs in error recovered a personal judgment against Brunson for the said amount of its claim, and the Minnetonka Lumber Company for \$13.20 of the same, and the Spurrier Lumber Company for \$1.85 of the same, also obtained judgment establishing their liens and for foreclosure of same against the defendant in error; but judgment was denied both these plaintiffs in error against said property and defendant in error as to remainder of the Brunson debt upon the finding of the trial court that the material furnished, from which all the indebtedness claimed, except said \$13.20 and said \$1.85, arose, was so furnished more than four months before any claim of lien was filed, and was so furnished under a separate and distinct contract from that under which the claims for said \$13.20 and

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said \$1.85, respectively, subsequently arose, and upon other findings, all of which become immaterial in view of another ground upon which this case may and should be decided.

It is well settled in this state that, in the absence of any statute expressly authorizing it, there can be no such lien on the public buildings or property of the state, nor of any subdivision thereof, as the same is forbidden by public policy and unenforceable; and section 4527, St. Okla. 1893 (section 3862, Rev. Laws 1910), does not authorize said lien. *Western Terra Cotta Co. & Warren Smith Hdw. Co. v. Board of Education of the City of Shawnee et al.*, 39 Okla. 716, 136 Pac. 595; *Hutchinson v. Krueger et al.*, 34 Okla. 23, 124 Pac. 591, 41 L. R. A. (N. S.) 315.

The judgment of the trial court, denying the claim of lien by plaintiffs in error, should be affirmed.

By the Court: It is so ordered.

KANSAS CITY SOUTHERN RY. CO. v. TANSEY.

No. 3125. Opinion Filed February 28, 1914.

(139 Pac. 267.)

1. **RAILROADS—Lien—Waiver.** The provisions of mutual contracts between the plaintiff in error, its principal contractor and subcontractors, examined, and held that, under their terms, the right to a lien upon the railway company and its properties was not waived by a subcontractor, where the action was brought therefor after the award of the resident engineer had been published. Following *Kansas City So. Ry. Co. v. Wallace*, 38 Okla. 233, 132 Pac. 908, 46 L. R. A. (N. S.) 112.
2. **SAME—Lien for Construction—Subject-Matter.** Under section 6166, Comp. Laws 1909 (Rev. Laws 1910, section 7803), any person other than the specific classes enumerated therein, who performed any work or labor upon or furnished any materials to facilitate the operation of any railroad, is entitled to a lien therefor upon the roadbed, buildings, equipments, income, franchises, and all other appurtenances. Following *Kansas City So. Ry. Co. v. Wallace*, *supra*.

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3. **STATUTES—Construction—Rule of Ejusdem Generis.** The rule of *ejusdem generis* is resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. Moreover, where the particular words exhaust the class, then the general words must be given a meaning beyond the class. Following **Kansas City So. Ry. Co. v. Wallace**, *supra*.
4. **RAILROADS—Lien for Construction—Right—Contractors and Subcontractors.** Contractors and subcontractors, who bring themselves within the terms of the act, are included within the provisions of section 6166, Comp. Laws 1909 (Rev. Laws 1910, sec. 7803), providing that "every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon * * * any railroad, shall have a lien therefor upon the roadbed," etc.

(Syllabus by Sharp, C.)

Error from District Court, Sequoyah County;
John H. Pitchford, Judge.

Action by M. Tansey against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Reed & McDonough, for plaintiff in error.

James W. Breedlove, for defendant in error.

Opinion by SHARP, C. This is an action brought by plaintiff below, as a subcontractor of the Ferguson Contracting Company, to recover for money due from that company to him, and to have the amount so found due fixed as a charge, in the nature of a lien, against the property of the defendant below, plaintiff in error here. The latter company was engaged in the construction or reconstruction of its roadbed in Sequoyah county, Okla. The contract for the reconstruction, or for the building anew of certain parts of said roadbed, was let by the defendant to the said contracting company. The latter company sublet a part of this work to the plaintiff, who performed the work both directly and by subcontracts, and was in part paid for the work done, by the contracting company. Before final payment was due plaintiff, the contracting company failed, being largely in-

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debted to numerous subcontractors, among whom was the plaintiff. Upon the trial the court found that there was due plaintiff from the contracting company \$2,840.11, and that said plaintiff was entitled to a lien for that amount against the roadbed and other property of the defendant railway company, and rendered judgment accordingly, from which judgment this appeal has been prosecuted.

The first question urged is that, under the contract existing between the parties, the plaintiff waived the right to a lien, even though included within the provisions of section 6166, Comp. Laws 1909 (Rev. Laws 1910, sec. 7803). The exact question was before the court, and adversely decided, in *Kansas City Southern Ry. Co. v. Wallace et al.*, 38 Okla. 233, 132 Pac. 908, 46 L. R. A. (N. S.) 112, and it is unnecessary at this time to attempt to add to what was there held.

It is next urged that the act of May 26, 1908 (Sess. Laws 1907-08, pp. 494, 495), provides only for a lien to those who furnish labor and materials toward the equipment of a railroad, or to facilitate its operation, and not to those that furnish labor upon its roadbed. The same contention was urged, and adversely decided, in *Kansas City Southern Ry. Co. v. Rosier et al.*, 38 Okla. 231, 132 Pac. 908, and *Kansas City Southern Ry. Co. v. Wallace et al.*, *supra*. These recent decisions render unnecessary the further consideration of this question.

The remaining question is that the statute providing that every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixture, or other thing, toward the equipment, or to facilitate the operation of any railroad, shall have a lien therefor upon the roadbed, buildings, equipment, income, franchises, and all other appurtenances of said railroad, does not within its terms include subcontractors. The exact question was before this court in *Kansas City Southern Ry. Co. v. Wallace*, *supra*. There the plaintiffs had a contract with the Ferguson Contracting Company, the same general contractor as in the instant case, to construct certain concrete abutments and piers, and to furnish material for the roadbed of the railway,

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while, in the present case, the plaintiff had a contract with said Ferguson Contracting Company to build and construct certain portions of the roadbed along the right of way of said railway company, and to make certain line changes of said roadbed between given points. The opinion of this court in the latter case contains an exhaustive review of the authorities, and it was held, under the general language of the statute, that it was intended to, and did, include contractors and subcontractors who brought themselves otherwise within the terms of the act.

Finding no error in the trial below, the judgment should be affirmed.

By the Court: It is so ordered.

BANK OF BIG CABIN v. ENGLISH.

No. 3177. Opinion Filed February 28, 1914.

(139 Pac. 258.)

BANKS AND BANKING—Collection of Deposit—Damages from Delay—Burden of Proof. October 25, 1907, the Bank of Big Cabin, Ind. T., received from the Inter-State National Bank of Kansas City advice by mail that the former's account had been credited by direction of J. G. English for a stated sum at the Bankers' Trust Company, also of Kansas City. The Bank of Big Cabin at the time maintained no business relations with either the bank or trust company at Kansas City. Immediately it gave English, who was at the time one of its regular depositors, credit upon its books for the amount of the deposits, which had been placed in the bank at Kansas City by a debtor of English, contrary to his instructions. **Held** that, by failing to exercise proper diligence in the withdrawal of its depositor's unauthorized deposit, the Bank of Big Cabin assumed the burden of showing that its failure was not through its fault, and that no damage resulted to its depositor by its delay.

(Syllabus by Sharp, C.)

Error from District Court, Craig County;
P. S. Davis, Judge.

Action by J. G. English against the Bank of Big Cabin. Judgment for plaintiff, and defendant brings error. **Affirmed.**

Opinion of the Court.

Seymour Riddle, for plaintiff in error.

W. H. Kornegay, for defendant in error.

Opinion by SHARP, C. In the opinion on a former appeal in this case, *Bank of Big Cabin v. English*, 27 Okla. 334, 111 Pac. 386, it was held that the liability of the Bank of Big Cabin, if liable at all, must be predicated upon the theory that it undertook to collect the money deposited in the Bankers' Trust Company of Kansas City for the plaintiff; that the relation of debtor and creditor would not arise between said bank and the plaintiff until after it had collected and secured possession of the money either actually or by settlement of accounts with the trust company. Upon this theory the parties proceeded in the second trial. No exception is made to the court's charge to the jury, the bank seeking a reversal upon the grounds: (1) That the court erred in not sustaining the demurrer to the plaintiff's evidence; (2) and in refusing to direct a verdict for the defendant.

The action being one based upon defendant's negligence, and the sufficiency of the proof to warrant the jury's verdict being raised, it is necessary to examine the evidence for the purpose of determining its legal sufficiency. The plaintiff, a depositor in defendant bank, shipped a car load of hogs from Big Cabin, Ind. T., to Kansas City, Mo., at the time writing a letter to Byers Bros. Commission Company, to whom the shipment was consigned, directing said company to send the proceeds of the shipment to the Bank of Big Cabin. On the day of arrival of the hogs, October 24, 1907, the commission company directed the inter-State National Bank of Kansas City to credit the Bank of Big Cabin with the proceeds of the shipment, amounting to \$909.99. The Inter-State National Bank, upon receipt of the commission company's check, wholly without authority, and of its own initiative, placed said deposit to the credit of the Bankers' Trust Company, and on the same day by postal card notified both the trust company and the Bank of Big Cabin of what it had done. On the morning following, to wit, October 25th, prior to opening the bank, Cashier Lee of the Big Cabin bank received the postal card from the Inter-State National Bank,

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and gave plaintiff credit for the deposit on the bank's individual ledger, which constituted the record of the general checking accounts of said bank. Plaintiff testified that the deposit was entered in his passbook while in the bank October 28th, while the testimony of the cashier, Lee, in this regard is not clear. On October 26th, upon receipt of postal card from the Inter-State National Bank, the Bankers' Trust Company drew on said bank for the amount of the commission company's deposit, which draft was paid through the clearing house on October 26th. On Monday, October 28th, the trust company failed, and on October 29th the Big Cabin bank charged back to English's account the amount of the deposit of October 25th. At the time the Big Cabin bank had no correspondent or reserve agent in Kansas City, though up until August, 1907, the Bankers' Trust Company had made a practice of cashing checks drawn by the Big Cabin bank on its sole correspondent, the International Bank & Trust Company, of Vinita, Ind. T., which relation had continued for a period of some six or seven months.

It is charged in defendant's answer that on the 24th day of October, 1907, the Bankers' Trust Company was in an insolvent and failing condition, and was known to be in such insolvent and failing condition by the Inter-State National Bank of Kansas City, and by other Kansas City banking institutions, though there is no proof directly tending to show that the Big Cabin bank had knowledge of the insolvent condition of the trust company. No effort was made by the Big Cabin bank to collect or transfer from the Bankers' Trust Company the unauthorized deposit made it by the Inter-State National Bank, except that on October 29th, after the trust company had failed, the Big Cabin bank wrote to the Inter-State National Bank, stating: "We desire that you get this money where we can get it." There was evidence to show that there was at the time both telegraphic and telephone service between Big Cabin, Ind. T., and Kansas City, Mo., and that a letter mailed in Big Cabin in the evening would reach Kansas City early the next morning; that the actual running time for trains between said points was from six to eight hours.

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Was the Big Cabin bank negligent in discharging its duty to exercise ordinary care and diligence to make a collection of its depositor's account? In effecting the collection or transmission of the funds, it was bound to the exercise of reasonable diligence. *Morse on Banks and Banking* (4th Ed.) secs. 218, 219, 244; *Hobart National Bank v. McMurrough*, 24 Okla. 210, 103 Pac. 601; *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248; *Kilpatrick v. Home B. & L. Ass'n*, 119 Pa. 30, 12 Atl. 754. No special agreement for making the collection was entered into between the bank and English. The former attempted to excuse its failure to act by the fact that it had not heard from the Bankers' Trust Company that it had received from the Inter-State National Bank the proceeds of the original deposit from the commission company. Neither the Inter-State National Bank nor the Bankers' Trust Company was correspondent or reserve agent of the Bank of Big Cabin, and, by accepting the collection for its depositor, it was incumbent upon it to proceed promptly. It was not compelled to undertake the collection, though it did so voluntarily. Accepting for collection a deposit in an institution with which it had no business relations, the local bank was at least bound to the exercise of reasonable diligence. The record is silent as to any proof of the custom observed by the Big Cabin bank, at or about the time in question, in making collections on Kansas City, though there is some proof that it had requested one of its customers there to make deposits with the National Bank of the Republic. Therefore the question as to the channels through which collections were usually made is not involved in the present case. There is, however, proof sufficient to show that, had the Big Cabin bank acted with due diligence, its draft for the withdrawal of the deposit could have been presented prior to the time the Bankers' Trust Company closed its doors. The question of negligence on the part of the collecting bank was one of fact for the jury. *Selover*, Bank Collections, p. 96; *Sahlien v. Bank of Loneoke*, 90 Tenn. 221, 16 S. W. 273; *Diamond Mill Co. v. Groesbeck Nat. Bank*, 9 Tex. Civ. App. 31, 29 S. W. 169; *Milwaukee Nat. Bank v. City Bank*, 103 U. S. 668, 26 L. Ed. 417. It is not clear, from the testimony, at what time on

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October 28th the Bankers' Trust Company failed, whether during the day or whether in fact it failed to open its doors on that day, or the exact time that it discontinued payment. In the case of the negligent presentation for payment of checks, the rule generally is that the burden of proof is on the holder of the check to show that no loss or injury has resulted to the maker through the delay in making presentment and giving notice. Story on Promissory Notes, sec. 498; Chitty on Bills, 355; *Anderson v. Rodgers*, *supra*; *Stephens v. Park*, 73 Ill. 387; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425. We are not at liberty to presume, in the absence of testimony, that, had due diligence been exercised by the Big Cabin bank to withdraw the funds from the trust company, its efforts would have been of no avail. The Bankers' Trust Company not closing its doors until Monday, the 28th, it is fair to presume that it met its obligations on Saturday, the 26th; or, even had the draft been presented on the 28th, it might have been paid before the trust company's discontinuance of business.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

BOORIGIE *et al.* v. BOYD.

No. 3139. Opinion Filed February 28, 1914.

(139 Pac. 253.)

1. **COURT'S—Records—Verity—Motion for New Trial.** A journal entry purporting to have been duly made, and reciting that a motion for a new trial was heard and denied on the same day that it appears to have been filed, cannot be attacked by a second and subsequent motion filed after the expiration of the time for filing such motions, on the ground that the hearing, if had, and the order, if made, were without announcement by the court, and without opportunity to except; it not affirmatively appearing that the movant's attorney was without notice or knowledge of the court's action.
2. **NEW TRIAL—Motion—Grounds.** It is not sufficient that an inference may fairly arise, from the facts charged in the second motion, that counsel was without notice of the hearing and the court's ruling. The want of notice should be made to affirmatively and unequivocally appear.

(Syllabus by Sharp, C.)

Opinion of the Court.

*Error from County Court, Cherokee County;
J. T. Parks, Judge.*

Action by J. S. Boyd against William Boorigie and William Rutledge. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

Bruce L. Keenan, for plaintiff in error.

Opinion by SHARP, C. Plaintiffs in error complain of the action of the trial court in overruling their petition and motion for a new trial, filed seemingly under the following circumstances: A verdict for plaintiff was returned on April 8, 1911, and on April 10th thereafter motion for a new trial was filed by defendants. The journal entry of judgment, it appears, was not filed until May 18th following. This journal entry recites, among other things, that after the verdict was returned, "to wit, on the 10th day of April, 1911, the attorney, Bruce L. Keenan, for defendants, filed a motion for a new trial, which was regularly heard on the 10th day of April, 1911, and, the same having been denied, it is therefore, here and now ordered, adjudged, and decreed that plaintiff have judgment against defendants," etc. On June 28, 1911, execution issued on said judgment, and on the following day defendants filed their petition and motion for a new trial, the overruling of which is assigned as error. This petition for a new trial charges, in effect, that the motion for a new trial was not heard by the court until the journal entry was signed on May 18th. It further states that, if in fact overruled, it was *pro forma*, and without announcement by the court, and without opportunity to except thereto. It is charged that the clerk's record fails to show that any action was taken on the motion for a new trial on April 10th, and from that fact it is urged that the motion for a new trial was not heard or disposed of by the court on that day.

We think the court properly denied plaintiff's second motion or petition for a new trial. If it were affirmatively made to appear that defendants had no opportunity to except to the action of the court in overruling the first motion, and to obtain

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time, if desired, in which to prepare and serve a case-made, we should be greatly disposed to grant the relief asked: but, where the duly signed court records affirmatively show that the motion for a new trial was regularly heard and overruled on a given date, such solemn record cannot be disregarded upon the filing of a second motion many weeks afterwards, and after execution had issued. The original motion for a new trial, it appears, was filed in open court by counsel for defendants, and, according to the journal entry of the judgment, was acted upon the same day. The fact that the clerk's record failed to show any action on said motion for a new trial is no evidence of the alleged fact that no such order was made. We must presume, in the absence of a contrary showing, that the court's proceedings were regular. Upon the hearing of the second motion it does not appear that any testimony was taken, or, if so, it has not been preserved in the record. Plaintiff's second petition, while verified, does not affirmatively show that counsel had no knowledge or notice of the court's action, though there is probably sufficient in the motion from which the inference might be drawn that he was without notice of the court's action until May 18th, when the journal entry was filed; but this we hold not sufficient. The want of notice should be made to affirmatively and unequivocally appear, and, as proof of this fact is wanting, we will not impute to the trial court that bad faith which must necessarily attach to its act, if it were made to appear that defendants' motion was overruled, not only in his absence, but without any opportunity being afforded him to except or save his case for review.

Plaintiff below obtained two judgments against defendants, one before a justice of the peace, the other on appeal to the county court. The testimony taken in the county court has not been preserved by bill of exceptions or case-made; only such part of the pleadings and proceedings as deemed necessary by counsel to present the errors complained of being included in the case-made. The case-made, as prepared, not having been served within the statutory time after the overruling of the motion for a new trial, and no extension of time having been asked,

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and it not appearing that the court committed any error in denying the second motion, we conclude that the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

FIRST NAT. BANK OF SALLISAW v. BALLARD *et al.*

No. 3141. Opinion Filed February 28, 1914.

(139 Pac. 293.)

1. **APPEAL AND ERROR—Scope of Review—Briefs.** Where plaintiff in error has, in compliance with the rules of the court, served and filed his brief, but the defendant in error has neither filed nor offered excuse for failure to file brief, the court is not required to search the record to find a theory upon which the judgment may be sustained, and may reverse the case in accordance with the prayer of the plaintiff in error, if the brief filed appears reasonably to sustain such action.
2. **PAYMENT—Proceeds of Mortgaged Property—Application.** In the absence of consent of mortgage debtor and his surety to make other application, to the extent of the mortgage indebtedness, the proceeds of mortgaged property should be applied as credit thereon.
3. **SAME.** A creditor who has wrongfully applied proceeds of mortgaged property as credit upon another indebtedness of the mortgagor may, in the absence of any intervening adverse right arising from such wrongful application which would affect the rule, correct his error by transferring such credit to the mortgage secured debt.
4. **CHATTEL MORTGAGES—Proceeds of Mortgaged Cotton—Compensation for Picking—Right to Retain.** Where a mortgage includes a debtor's entire crop of cotton, without reservation in this regard, he is not entitled to retain from the proceeds of such crop compensation of himself and family for labor in picking same, without the consent of both holder of mortgage and surety.

(Syllabus by Thacker, C.)

Error from County Court, Sequoyah County:

W. N. Littlejohn, Judge.

Action by the First National Bank of Sallisaw against C. B. Ballard, B. E. Moody, and W. H. Brackett, on promissory note. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

J. H. Jarman, for plaintiff in error.

E. M. Frye, for defendants in error.

Opinion by THACKER, C. The position of the parties in respect to their descriptive titles remains the same as in the trial court; but, having no occasion to refer to the sureties, we will hereinafter refer to the principal debtor alone as "defendant."

Plaintiff has filed case-made and, in compliance with the rules of court, has served and filed his brief; but the defendants in error have neither filed nor offered any excuse for failure to file a brief; and, in such cases, this court is not required to search the record to find a theory upon which the judgment may be sustained, but may reverse the judgment in accordance with the prayer of the plaintiff in error, if the brief filed appears reasonably to sustain such action. *Phillips v. Rogers*, 30 Okla. 99, 118 Pac. 371; *Doyle v. School Dist. No. 38, Noble County*, 30 Okla. 81, 118 Pac. 386; *Bank of Grove v. Dennis*, 30 Okla. 70, 118 Pac. 570; *Flanigan v. Davis*, 27 Okla. 422, 112 Pac. 990; *Missouri, K. & T. Ry. Co. v. Long*, 27 Okla. 456, 112 Pac. 991.

Plaintiff held two notes against defendant, each having, as joint and several makers with him, the signatures of two sureties, one of whom was surety on both notes, one for the principal sum of \$345, secured by a chattel mortgage upon property which included the defendant's entire one-half of a crop of cotton, while the other note, for the principal sum of \$55.50, was not secured otherwise than as stated above.

Defendant, aided by his family, picked and marketed this crop of cotton, turning in to plaintiff some of the proceeds; and, without any agreement or understanding between any of the parties thereby affected, the plaintiff in the first instance voluntarily applied, as credits upon said \$55.50 note, \$38.25 of such proceeds, but afterwards, and at the instance of the sureties on said \$345 note, canceled said credits on said \$55.50 note and applied the same upon said \$345 note. The proceeds of the mortgaged property, it appears inferentially, proved inadequate, or at most was not more than adequate, to discharge said \$345 note.

Opinion of the Court.

This action was brought upon said \$55.50 note, which was admittedly entitled to a credit of \$2.50; but defendant claimed in defense in part to the action that said sum of \$38.25 was a proper credit upon this note, and that plaintiff had no right to cancel it as such credit and transfer it to the other note because it was proceeds of such crop of cotton to which he was entitled as compensation for the picking of the cotton by himself and family. Defendant claims a tender as to \$15.67; but it is not necessary to discuss this question.

It is apparently indisputable that defendant is indebted to plaintiff in the amount of the note in suit here, less a credit of \$2.50; but defendant claims in effect that this indebtedness is not in its greater part upon this note, but is upon the \$345 note to the extent of the credits transferred, which note plaintiff has surrendered.

In the absence of the consent of both the mortgage debtor and his surety, the proceeds of mortgaged property coming into the hands of the mortgagee should, to the extent of the mortgage debt, be applied as credit thereon; and a creditor who has wrongfully applied such proceeds upon another indebtedness of the mortgagor may, in the absence of any intervening adverse right arising from such wrongful application which would affect the rule, correct his error by transferring such credit to the mortgage secured debt. Rev. Laws 1910, secs. 1056, 1058, 1063; *Johnson v. Jones*, 39 Okla. 323, 135 Pac. 12; *Jones on Chattel Mortgages* (5th. Ed.) sec. 640; 7 Cyc. 115, 116; *Schiffer & Nephews v. Feagin*, 51 Ala. 335; *Summer v. Kelly*, 38 S. C. 507, 17 S. E. 364; *Nichols, Shepherd & Co. v. Knowles* (C. C.) 17 Fed. 494, 3 McCrary, 477; *Sanders v. Knox*, 51 Ala. 80; *Ogden v. Harrison*, 56 Miss. 743; *Caldwell v. Hall*, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64; *Boynton v. Spafford*, 61 Ill. App. 384; *Kirkpatrick v. Hawk*, 80 Ill. 122; *Stewart v. Davis, Ex'r*, 18 Ind. 74; *Bank of Monroec v. Gifford*, 79 Iowa, 300, 44 N. W. 558; *Embrce v. Strickland*, 1 White & W. Civ. Cas. Ct. App. sec. 1299; *Holliday v. Brown*, 33 Neb. 657, 50 N. W. 1042; *Pierce v. Atwood*, 64 Neb. 92, 89 N. W. 669.

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Where a mortgage includes a debtor's entire crop of cotton, without any reservation whatever, he is not entitled to retain from the proceeds of such crop compensation for the labor of himself and family in picking same, without the consent of both the holder of the mortgage and the persons who are his sureties.

For the reasons stated, this case should be reversed and remanded, and a new trial granted.

By the Court: It is so ordered.

EDMONDSON *et al.* v. FRANCISCO, *Road Sup'r.*

No. 3199. Opinion Filed February 28, 1914.

(139 Pac. 279.)

1. **INDIANS—Indian Lands—Establishment of Highways—Damages.** Under section 37 of the Cherokee Allotment Act of July 1, 1902, c. 1375, 32 St. at L. 722, public highways two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees, purchasers, and others shall take the title to such lands subject to said provision. But if the buildings or other improvements are damaged in consequence of the establishment of such public highways, such damages shall be determined and paid for as in said section provided and authorized.
2. **SAME.** A road overseer is without authority to open up section lines in the Cherokee Nation, on which are located orchards, houses, and other valuable improvements, placed there before allotment, where the necessary result of his act would be to materially damage or destroy such orchards, houses, or other improvements, without the damages thereto having first been determined and paid for.
3. **SAME—Injunction.** Under such circumstances, injunction will properly lie to enjoin a threatened trespass to open up section lines; no steps having been taken to determine the amount of damage about to be done, or to pay therefor.

(Syllabus by Sharp, C.)

Error from District Court, Delaware County;
T. L. Brown, Judge.

Opinion of the Court.

Action by M. S. Edmondson, Florence Edmondson, and Beulah D. Edmondson, against G. B. Francisco, as road supervisor. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

J. G. Austin, for plaintiffs in error.

Ad V. Coppedge, for defendant in error.

Opinion by SHARP, C. On May 16, 1911, plaintiffs brought suit in the district court of Delaware county against defendant as road supervisor, and in their petition charged that they were the owners and in possession of various tracts of land therein described, aggregating about 500 acres, which said lands were situated in sections 25 and 36, township 22 north, range 24 east, and in sections 30 and 31, township 22 north, range 25 east; that prior to allotment of said lands, and before the same were definitely surveyed, they had put out thereon an orchard, and at great expense had built a house and dug a well near the section line between said sections 30 and 31, and that a road one rod on each side of said section line would include said well and take a part of plaintiffs' house; that the establishment of a road between sections 30 and 31 was impractical and all but impossible, except at great expense, and that the establishment and opening of said section line would prove no benefit to the general public, and would work a great hardship to plaintiffs, and very greatly depreciate the value and usefulness of their property; that the establishment of a road between sections 25 and 36 would cause the destruction of the crops planted thereon, and would materially damage and practically destroy, and likewise greatly depreciate, plaintiffs' property, and would also be impractical without the incurring of great expense. The petition further charged that in September, 1908, there was filed in the office of the county clerk of Delaware county a petition asking to have opened up a highway in that vicinity, on practical lines therein named, and that in July, 1910, the plaintiffs herein filed with the board of county commissioners of Delaware county their consent in writing to the establishment of a highway on their lands along lines named therein, waiving

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any and all claims for damages on account thereof; that on the 17th day of August thereafter, said petition coming on to be heard, it was found by the board of commissioners that the petition was legal, that the proposed road was a public necessity, and that the same could be made without unreasonable expense, and it was ordered that the county surveyor make a plat of said road and report to the board; that in September following, the surveyor reported in writing his survey of the premises. It is further charged that, relying upon the acts of said officers, plaintiffs did not fence said section lines for travel, but had continued to occupy the same and to plant crops thereon, but had opened up for travel said newly established road, and that the same had been accepted by the county commissioners, and was then a public highway; that defendant, claiming to act in his official capacity as a road supervisor of the district in which said lands were situated, had caused notice to be served upon plaintiffs, and had threatened to open up said section lines on or after the 28th of May following the service of notice, if the same were not opened up by plaintiffs. At another place in the petition it is charged that the county commissioners had not vacated the section lines, but had expressed their desire to do so. Other allegations of the petition leave somewhat in doubt the true state of facts, but these allegations are not material to the real issue. Just what authority the road supervisor had, in view of the seemingly amicable settlement between the owners of the land and the board of county commissioners, it is not easy to determine. From the petition it seems that the only obstacle in the proceedings arose out of the fact of an existing doubt as to the authority of the county commissioners to vacate the section lines between certain points, which we assume was the inducement offered by the owners for giving, free of charge, a highway across their individual lands on practical lines. But a proper determination of the issues presented by the demurrer to the petition confines the question to be determined to much narrower grounds than that argued by counsel in their briefs. Plaintiffs asked and obtained a temporary injunction restraining the defendant from opening up a portion of the section lines

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between sections 25 and 36, and 30 and 31, and the range line between ranges 24 and 25. From the subsequent order sustaining a demurrer to plaintiffs' petition, and in dissolving said injunction, this appeal has been prosecuted.

The Cherokee Allotment Act of July 1, 1902 (32 St. at L. 716) sec. 37, provides as follows:

"Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees, purchasers, and others shall take the title to such lands subject to this provision; and public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the direction of the Secretary of the Interior while the tribal government continues and to be paid by the Cherokee Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether along section lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid for in the same manner."

It will be noted that if buildings or other improvements are damaged in consequence of the establishment of public highways or roads, whether along section lines or elsewhere, the determination and payment of the damages are provided for by the express terms of the act.

As has been seen, plaintiffs were the owners, both of buildings and other improvements on the section lines threatened to be opened up by said defendant. It does not appear that any steps had been taken toward condemning said improvements, or that any compensation therefor had been paid. Irrespective of the cause that prompted defendant to threaten to open the road on the section lines, and without giving consideration to the action of the commissioners in the movement had to locate and establish a public highway elsewhere than on the section lines, it is obvious that the action threatened was without warrant or authority of law. While section 37 of the act of July 1, 1902, provides that public highways or roads two rods in width, being one rod on each side of the section line, may be

established along all section lines without compensation being paid therefor, it further expressly provides for compensation for all buildings or other improvements damaged in the location of said roads. By our Organic Act (section 24, art. 2, Constitution) it is provided that private property shall not be taken or damaged for public use without just compensation. Such was the act threatened by defendant.

In *Good et al. v. Keel et al.*, 29 Okla. 325, 116 Pac. 777, the effect of the act of Congress of April 26, 1906 (34 St. at L. 145, sec. 24, c. 1876), pertaining to highways in the Choctaw, Chickasaw, and Seminole Nations, and its effect upon the owners of allotments made prior to its passage, was under consideration, and it was there held that the act did not authorize the highway officials of the state to take and condemn without compensation a strip one rod on each side of the section lines. The order of the trial court perpetually enjoining the road officer "from opening up said road without first having condemned the property of the plaintiffs and paid therefor" was sustained by this court, which held that the trial court was correct in holding that the allottees were entitled to compensation.

In the instant case, as to the house and other improvements, the provisions of section 37, *supra*, are similar to those of section 24 of the act of April 26, 1906, and must be given the same construction as was given by this court in the above cases. Under the terms of the allotment act, the matter of fixing compensation for buildings or improvements was vested in the Secretary of the Interior during the continuance of the tribal government, while by statute the power to condemn lands for highways is given to any county, city, township, or school district. Section 3330, Comp. Laws 1909 (Rev. Laws 1910, sec. 3188). It is unnecessary to determine in which the power is now vested, or what the procedure may be for opening up section lines on which there are situated houses, wells, or orchards, for it does not appear that any effort by any one in authority was made to compensate plaintiffs for the value of their property.

In what we have said, we do not wish to be understood as questioning the right of the public to have opened up public

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highways on section lines, or elsewhere, when authorized by law, whenever necessary for the public good, but where there is situated, on such highways, houses and improvements of the character heretofore named, the right of the owner thereof to be paid a just compensation, after the manner required by law, is not open to question. The petition charges that these improvements were erected on the premises before the same were definitely surveyed, and prior to allotment. Section 2, art. 17, Williams' Ann. Const. Okla., provides that the state of Oklahoma accepts all reservations and lands for public highways, made under any grant, agreement, treaty, or act of Congress, with the express provision, however, that said section shall not be construed to prejudice the vested rights of any tribe, allottee, or other person to such land. The ownership, therefore, of the plaintiffs in and to their buildings and other improvements on said lands was vouchsafed them by our organic law.

From what has been said, it is clear that the defendant, acting as an officer of his township, was without authority of law to proceed in the manner threatened. Nor is this opinion in conflict with the decision of this court in *Mills v. Glasscock*, 26 Okla. 123, 110 Pac. 377, the facts being unlike.

The judgment of the trial court should therefore be reversed, and the cause remanded, with instructions to overrule the demurrer, vacate the order discharging the temporary injunction, and to proceed further in accordance with this opinion.

By the Court: It is so ordered.

City of Purcell v. Stubblefield.

CITY OF PURCELL v. STUBBLEFIELD.

No. 3454. Opinion Filed February 28, 1914.

(139 Pac. 290.)

1. **MUNICIPAL CORPORATIONS—Defective Streets—Personal Injuries—Liability.** A municipal corporation in the Indian Territory, prior to statehood, being governed by the Arkansas laws, was not liable for injuries resulting to persons from defective streets and obstructions along and across the sidewalks thereof, and on November 16, 1907, by the terms of the Enabling Act (Act June 16, 1906, c. 3335, 34 St. at L. 267), the laws governing municipal corporations in Oklahoma Territory, and then in force, were extended over towns and cities in the Indian Territory, and these laws imposed a duty on municipal corporations and their officers to maintain the streets and sidewalks in a safe condition for the use of its inhabitants and other persons lawfully using the streets.
2. **SAME.** On January 28, 1909, it was the duty of the city of Purcell, being a city of the first class under the statutes of Oklahoma, to use reasonable care to keep its streets and sidewalks in a safe condition for persons using the same, and for failure to perform this duty said city was liable in damages to one injured by a sign falling and striking him, which had been permitted to remain across and above the sidewalk on one of its streets; the negligence of such person not contributing to such injury.
3. **SAME—Defects—“Act of God.”** When a heavy wooden sign, permitted to remain suspended over and above a street, is blown down by a severe wind, and strikes and injures one lawfully passing along the street, the city cannot relieve itself from liability by asserting that the injury was caused by an act of God, unless it also shows that the wind was unprecedented, and was the sole cause of the injury.

(Syllabus by Galbraith, C.)

*Error from District Court, McClain County;
Robinson McMillan, Judge.*

Action by J. H. Stubblefield against the City of Purcell for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Hocker, for plaintiff in error.

J. F. Sharp, John E. Luttrell, and J. B. Dudley, for defendant in error.

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Opinion by GALBRAITH, C. On the 13th day of October, 1909, J. H. Stubblefield commenced this action in the district court of McClain county against the city of Purcell, a city of the first class, under the statutes of Oklahoma, to recover damages for personal injuries resulting to him from its alleged negligence. It is charged in the petition that on the 28th day of January, 1909, while passing along Main street, one of the principal thoroughfares of the defendant city and near the location of the United States post office therein, about one o'clock in the afternoon of said day, a heavy wooden sign, which the defendant city had permitted to be suspended and remain over the sidewalk, and immediately over and above the heads of the persons passing along said sidewalk, broke loose from its fastenings, fell upon the plaintiff, striking him upon the head and severely injuring him, cutting and lacerating his head and right eye, making a wound one and seven-eighths inches in length, and otherwise injuring him, from which he suffered great bodily pain and mental anguish, loss of time, etc., to his damage in the sum of \$2,500, and that said sign had been permitted by the defendant city to be suspended in a careless and negligent manner from the roof of an awning over the sidewalk supported by small wires, and said wires had become worn, rusted, and twisted so as to greatly weaken their strength, and render them unsafe to hold said sign against the force of the ordinary winds prevalent in that locality; that this sign had been permitted to remain in this unsafe condition for months prior to plaintiff's injury; and that the plaintiff was without knowledge of the dangers threatening and imminent to persons passing along the street beneath it, and that he was without fault or negligence. The defendant city denied its responsibility for the hanging of said sign, or permitting it to remain across the street, and alleged that it had neither actual nor constructive notice of the danger, and denied any negligence or carelessness on its part, and as a special defense alleged that the falling of the sign was due to an extraordinary wind that was blowing at the time, and that the accident was caused by an act of God, and the city was therefore not liable.

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A reply was filed by the plaintiff, and the cause was submitted to the court and a jury, and a verdict rendered in favor of the plaintiff in the sum of \$500. Upon the overruling of the defendant's motion for a new trial, an appeal was perfected to this court by petition in error and case-made.

The several assignments of error are grouped and discussed in the plaintiff in error's brief under three propositions, viz.:

"First. A municipality governed by the laws in force in the Indian Territory, by the acts of Congress not being liable for injuries resulting from the negligence of its officers in failing to maintain its streets and sidewalks in a safe condition, did the adoption of the Constitution make the city liable for an injury happening after statehood caused through the negligence of its officers occurring prior to statehood?

"Second. Is a municipal corporation in Oklahoma an insurer of the safety of its streets, or only chargeable with the exercise of ordinary care and diligence in preventing the erection and maintenance of dangerous objects over its sidewalks by the occupant of the abutting property?

"Third. Would a municipal corporation in Oklahoma be chargeable with negligence by an object suspended above its streets falling into the street, the proximate cause of the falling being a sudden gust of wind or wind of extraordinary violence, which could not, with the exercise of reasonable foresight, have been contemplated?"

It is insisted that a negative answer should be returned to each of these questions.

It may be conceded that a municipal corporation in the Indian Territory prior to statehood was not liable to an individual for injuries produced by the negligence of its officers in the construction and maintenance of the streets and sidewalks therein (as was held by the Circuit Court of Appeals for the Eighth Circuit, in the case of *Blaylock v. Incorporated Town of Muskogee*, 54 C. C. A. 639, 117 Fed. 125), following the decisions of the highest court in Arkansas, from which state the law governing such cities was adopted by act of Congress.

It is argued that, inasmuch as the sign causing the injury to the plaintiff was erected by a citizen prior to statehood, and since, under the law governing cities in the Indian Territory

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prior to statehood, the city could not be held liable for the injury, then under the Schedule of the Constitution providing that "no existing rights, actions, * * * shall be affected by the change in the forms of government," etc., the laws in force in Oklahoma Territory and extended over the state by the Enabling Act (section 394, Wilson's Rev. & Ann. St., being section 589, Rev. Laws 1910), giving the city council the right to prohibit and prevent all encroachments into and upon the sidewalks, etc., and the power to regulate the building of stairways, windows, doors, awnings, and all other structures, etc., projecting upon, over, and adjoining sidewalks along the streets of the city, and the construction of this statute placed upon it by the Supreme Court of the territory, holding municipal corporations liable for damages of the character complained of in the instant case, was not applicable and did not apply to cities located in what was formerly the Indian Territory part of the state, and therefore the defendant city is not liable in the instant case. This argument is not sound. The injury not having been received until fourteen months after statehood, the cause of action did not arise prior to that time. So far as the instant case is concerned, upon the advent of statehood, there was no "existing rights, actions," to be affected by the change in the laws and form of government. The laws then in force in Oklahoma Territory relating to municipal corporations were applicable to municipal corporations in the Indian Territory. These laws having been extended throughout the entire state on November 16, 1907, by the terms of the Enabling Act, the obligations and the duties thereby imposed were controlling in the defendant city the same as in other cities of the same class throughout the state. The defendant city is charged in the petition not only with negligence in permitting this sign to be erected and supported in the manner it was, but it is also charged with negligence in permitting it to remain in the position in which it was placed, being a menace and danger to persons passing along the street beneath it, a clear charge of failure to discharge a plain duty imposed upon the defendant city by the laws by which it was governed subsequent to statehood. While it is true that

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the city would not have been liable, if the accident had occurred prior to statehood, yet, since it did happen more than a year after statehood, and since the law extended over the defendant city at statehood imposed new duties and obligations upon it, among which was the duty of keeping and maintaining its streets and sidewalks in a safe condition for persons using the same in a lawful manner, for failure to discharge this duty after such laws were extended over and placed in force throughout the entire state, the defendant city was liable the same as cities organized under the statutes of Oklahoma. See *Town of Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *City of Stillwater v. Swisher*, 16 Okla. 585, 85 Pac. 1110; *City of Oklahoma v. Meyers*, 4 Okla. 686, 46 Pac. 552; *City of Guthrie v. Swan*, 6 Okla. 423, 41 Pac. 84; *Town of Fairfax v. Giraud*, 35 Okla. 659, 131 Pac. 159.

The rule is announced in *Norman v. Teel*, *supra*, as follows:

"A municipal corporation is bound by law to use ordinary care and diligence to keep its streets and sidewalks in a reasonably safe condition for public use in the ordinary modes of traveling, and, if it fails to do so, it is liable for injuries sustained by reason of such negligence, provided, however, that the party injured exercises ordinary care to avoid the injury. Ordinary care as applied to this class of cases means that degree of care and caution which might reasonably be expected of an ordinarily prudent person under the circumstances * * * at the time of the injury, and this is a question of fact for the jury to determine."

In the *Town of Fairfax v. Giraud*, 35 Okla. 659, 131 Pac. 159, the second paragraph of the syllabus is as follows:

"A person traveling on a public street of a city, which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe condition, and is reasonably safe for ordinary travel by night, as well as by day, throughout its entire width, and is free from all dangerous holes and obstructions."

And the third paragraph of the syllabus reads as follows:

"In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and, in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was

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guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part; and, when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence."

It appears from the evidence that the defendant city had no ordinance regulating the erection or hanging of signs along its streets, and that it had no actual notice of the danger of this particular sign; still, if by the use of ordinary diligence by its officers the danger could have been discovered, it is charged with actual knowledge. It is said by the Supreme Court of Oklahoma Territory, in *Norman v. Teel, supra*, on this question:

"The sufficiency of notice to fasten liability upon a city for a defective sidewalk is a question of fact to be determined by a jury under all the circumstances surrounding the particular case. It is not essential that the corporation shall have actual notice. If the defective condition of the street or sidewalk has existed for such a period of time that, by the exercise of ordinary care and diligence, the city authorities could have repaired the defect, and placed the street or sidewalk in a reasonably safe condition, and it fails to do so, then it is liable for any injuries that may be occasioned thereby by reason of such negligence, provided the injured party was in the exercise of ordinary care."

Where a sign nine feet and ten inches in length, seventeen and one-half inches wide, and weighing 44 pounds, was permitted to remain suspended over the walk for more than a year after statehood and prior to the accident, whether the city during these months should have discovered the dangers incident to the sign hanging in the manner and position it was, and its failure to remove it or cause it to be securely fastened constituted negligence, was a question of fact for the jury to determine. The jury by its verdict found that the defendant city was negligent in this, and this finding, being supported by sufficient evidence, is conclusive on that point.

In answer to the third contention of the plaintiff in error, that it cannot be held liable because the injury was occasioned by the act of God, it is only necessary to say that the evidence shows that on the day and at the time of the injury a strong wind was blowing in Purcell. There was a conflict in the testimony as to whether such winds were unprecedented, or were

reasonably to be expected at that season of the year in that locality. The character of the wind and its relation to and connection with the accident were questions of fact for the jury. Even if it were admitted that the wind was unprecedented on that day, and that there had never been such a wind as that before, yet, if the accident was not due entirely to this wind, but the strong wind in connection with the negligence of the defendant operated as an efficient and contributory concurrent cause, then the defendant would still be liable. The definition of an act of God, as given by this court, is "an act of God, such as an unprecedented rainfall and resulting flood, which will excuse from liability, must not only be the proximate cause of the loss, but it must be the sole cause. If, however, the injury is caused by an act of God, commingled with the negligence of the defendant, as an efficient and contributory concurrent cause, and the injury would not have occurred except for such negligence, the defendant will be liable." *M., K. & T. Ry. Co. v. Johnson*, 34 Okla. 582, 126 Pac. 567. Applying this definition to the facts of this case, in order for this defense to avail the defendant city, it must be found that the wind that day was of an extraordinary and unprecedented velocity, and that this wind was the sole cause of the sign falling and the resulting injury. No one can say upon this record that the wind, extraordinary though it may have been, was the sole cause of the accident, nor that the negligence of the city and its officers in allowing this sign to remain swinging over the sidewalk for fourteen months was not a contributing cause of the accident.

The jury may have found from the evidence that this large sign suspended over the sidewalk, supported by small wires, bent and rusty, so that a gentle breeze caused it to swing back and forth, was a danger and menace to persons passing under it, at any time, and, when the gentle zephyrs down Purcell way should lash themselves into the fury of a gale, it became a real peril to any one passing that way, and that, if the defendant city had discharged the duty imposed upon it by law, the sign would have been removed long prior to January 28, 1909, the date of the accident.

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Exceptions were saved to a number of instructions given by the court, and also to the court's refusal to give a number of instructions requested by the plaintiff in error. It does not seem to be necessary to examine these instructions in detail, since the court, in its instructions to the jury, covered the theory of the law as hereinbefore set out, namely, that subsequent to statehood the duty was imposed upon the defendant city by the statute to use reasonable care and caution to keep its streets and sidewalks in a safe condition for public travel; and whether or not this duty had been properly discharged by the defendant, and whether or not it had notice of the dangerous condition of this sign, these several issues were properly submitted to the jury under the instructions. The plaintiff in error embodied its theory as hereinbefore discussed in the requested instructions, and we are constrained to hold that the court did not err in refusing to adopt the theory of the law of this case as set out in these requested instructions; and it was not error to refuse to give them.

No sufficient reason appearing for disturbing the judgment appealed from, we conclude that the same should be affirmed.

By the Court: It is so ordered.

FARMERS' LOAN & TRUST CO. v. LOYD *et al.*

No. 3464. Opinion Filed February 28, 1914.

(139 Pac. 278.)

JUSTICES OF THE PEACE—Appeal Bond—Liability of Sureties. A judgment was rendered against two defendants in the justice court; and appeal taken to the county court by said defendants, who gave an appeal bond signed by themselves and two sureties, which bond was approved by the justice of the peace. The case was tried in the county court, and judgment was rendered in favor of one of said defendants, D. C. Hybarger, and against the other defendant, A. N. Loyd. An execution was issued upon said judgment against the defendant A. N. Loyd, and was returned by the officer, "No property found." A motion was filed under section 6398, Comp. Laws 1909 (Rev. Laws 1910, sec. 5477), asking for judgment against the sureties on the appeal bond. An agreed statement of facts was entered into by the parties interested reciting the record in

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said cause. **Held**, that the sureties on the appeal bond are jointly and severally liable for any judgment recovered against either of said appellants.

(Syllabus by Rittenhouse, C.)

*Error from County Court, Pontotoc County;
Conway O. Barton, Judge.*

Action by the Farmers' Loan & Trust Company against A. N. Loyd, D. C. Hybarger, F. O. Harris, and M. C. Lee. Judgment for certain defendants, and plaintiff brings error. Reversed and remanded, with instructions.

On the 14th day of June, 1910, the plaintiff in error recovered a judgment against the defendants A. N. Loyd and D. C. Hybarger before a justice of the peace. The defendants filed an appeal bond in said cause signed by themselves as principals, and F. O. Harris and M. C. Lee as sureties, which bond was approved by the justice and the papers forwarded to the county court. On the 16th day of August, 1910, the cause was tried before the county court, where the plaintiff in error recovered judgment against A. N. Loyd, but failed to procure a judgment against D. C. Hybarger. Afterwards an execution was issued against A. N. Loyd and returned, "No property found." On November 29, 1910, motion was filed for judgment against the sureties on the appeal bond, and notice thereof given as required by law. On the 3d day of August, 1911, a stipulation was entered into by all parties interested, stipulating the facts arising under the motion for judgment. On the 30th day of August, 1911, the court overruled the motion for judgment against the sureties, F. O. Harris and M. C. Lee, to which the plaintiff in error excepted, and plaintiff in error brings the case here for review, assigning as error the action of the court in overruling said motion.

Currie & Duncan, for plaintiff in error.

Stone & Marcy, for defendants in error.

Opinion by RITTENHOUSE, C. (after stating the facts as above). The facts as above set forth have been admitted by all the parties interested, and the only question to be decided in

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this cause is whether or not the sureties on the appeal bond were released from liability thereunder by reason of the fact that in the trial of the case in the county court judgment was rendered in favor of the defendant Hybarger and against his codefendant Loyd; both of said defendants being the appellants in this cause.

Omitting the caption and qualification, the following is a copy of the bond in controversy:

"Know all men by these presents: That we, A. N. Loyd, and D. C. Hybarger, as principals and ———, as sureties, are held and firmly bound unto Farmers' Loan & Trust Company in the penal sum of two hundred and fifteen (\$215.00) dollars, for the payment of which sum, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. The condition of the above obligation is such, that whereas, on the 14th day of June, 1910, the above-named Farmers' Loan & Trust Company, obtained judgment against the above-named principal, before H. J. Brown, justice of the peace of Ada township in said county for the sum of ninety and no-100 dollars and interest and for costs of suit taxed at six dollars, and said principal herein intends to appeal from such judgment to the county court of said county: Now, therefore, if said principal shall prosecute said appeal to effect without unnecessary delay, and if judgment be rendered against them on appeal shall satisfy such judgment and costs, then this obligation to be void; otherwise to remain in full force and effect."

Without doubt the county court of Pontotoc county should have rendered judgment in favor of the plaintiff in error and against the sureties on said bond, on the motion for judgment against such sureties. The bond was given as security for the payment of any judgment rendered against the defendants appealing, or either of them, and, while the plaintiff in error failed to procure a judgment against the defendant Hybarger, yet it did procure a judgment against the other defendant, A. N. Loyd, who was also one of the appellants. The fact that Hybarger was released of any liability in said cause does not release the sureties on said bond from their liability on the judgment rendered against Loyd. The showing made by the defendants in error in the county court that the judgment was

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rendered in favor of one appellant and against the other is not sufficient to relieve the sureties of their liabilities under said bond. This question has been decided in the case of *Cotton v. Alexander*, 32 Kan. 339, 4 Pac. 259, and *Moore et al. v. Mulvane*, 6 Kan. App. 191, 51 Pac. 569.

It follows that the judgment of the trial court in overruling the motion for judgment against the sureties should be reversed, and the cause remanded, with instructions to sustain the motion and render judgment accordingly.

By the Court: It is so ordered.

WALLINGFORD v. WOOD *et al.*

No. 3474. Opinion Filed February 28, 1914.

(139 Pac. 252.)

APPEAL AND ERROR—Dismissal—Brief. Where plaintiff in error has filed no brief, as required by rule 7 of this court (38 Okla. vi), the appeal will be dismissed for want of prosecution.

(Syllabus by Rittenhouse, C.)

Error from Superior Court, Custer County:

J. W. Lawter, Judge.

Action in replevin by Lydia L. Wallingford against C. B. Wood and the Bonebrake-Lacy Hardware Company. Judgment for the defendants, and plaintiff brings error. Dismissed.

M. L. Holcombe, for plaintiff in error.

Shull & McKnight, for defendants in error.

Opinion by RITTENHOUSE, C. This appeal was filed in this court January 2, 1912. Neither party has filed a brief, nor have they offered any excuse for the failure to do so. It is evident that the proceedings have been abandoned. The appeal should therefore be dismissed for want of prosecution under rule 7 of this court (38 Okla. vi). *Streeter v. McCoy*, 34

Deible et al. v. Union Iron Works.

Okla. 490, 126 Pac. 216; *Thompson v. Murray*, 34 Okla. 521, 125 Pac. 1133; *Streeter v. Huene*, 34 Okla. 491, 126 Pac. 216; *Reliable Ins. Co. v. Newcomber*, 34 Okla. 759, 127 Pac. 260; *M., O. & G. Ry. Co. v. Johnson*, 34 Okla. 816, 127 Pac. 386; *First Nat. Bank v. Baldwin*, 34 Okla. 825, 127 Pac. 260; *Snow v. Frye*, 34 Okla. 826, 127 Pac. 422.

By the Court: It is so ordered.

DEIBLE *et al.* v. UNION IRON WORKS.

No. 3478. Opinion Filed February 28, 1914.

(139 Pac. 252.)

APPEAL AND ERROR—Dismissal—Brief. Where plaintiff in error has filed no brief, as required by rule 7 of this court (38 Okla. vi), the appeal will be dismissed for want of prosecution.

(Syllabus by Rittenhouse, C.)

Error from District Court, Pittsburg County;
Preslie B. Cole, Judge.

Action by the Union Iron Works against A. Deible, F. Deible, and John Edmondson to recover money judgment, and for the foreclosure of an alleged mechanic's lien. Judgment for plaintiff, and defendants bring error. Dismissed.

Cad Mathis, for plaintiffs in error.

A. C. Markley, for defendant in error.

Opinion by RITTENHOUSE, C. This appeal was filed in this court January 3, 1912. Neither party has filed a brief, nor have they offered any excuse for the failure to do so. It is evident that the proceedings have been abandoned. The appeal should therefore be dismissed for want of prosecution, under rule 7 of this court (38 Okla. vi). *Streeter v. McCoy*, 34 Okla. 490, 126 Pac. 216; *Thompson v. Murray*, 34 Okla. 521, 125 Pac. 1133; *Streeter v. Huene*, 34 Okla. 491, 126 Pac.

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216; *Reliable Ins. Co. v. Newcomber*, 34 Okla. 759, 127 Pac. 260; *M., O. & G. Ry. Co. v. Johnson*, 34 Okla. 816, 127 Pac. 386; *First Nat. Bank v. Baldwin*, 34 Okla. 825, 127 Pac. 260; *Snow v. Frye*, 34 Okla. 826, 127 Pac. 422.

By the Court: It is so ordered.

ZENO v. BAZZELL et al.

No. 3497. Opinion Filed February 28, 1914.

(139 Pac. 281.)

1. **BILLS AND NOTES—Variance—Exclusion of Evidence.** Where the facts which warrant a judgment for the plaintiff have been clearly alleged, and the defendants have admitted the execution of the note sued on, and the court sustained an objection to the introduction of such note in evidence on the ground that there was a fatal variance because the original note was dated March 25, 19—, and the copy attached to the petition was dated March 25, 1910, held that the court erred in sustaining the objection to the introduction of such instrument in evidence.
2. **SAME—Materiality.** No variance between the allegation of the pleading and the proof is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits.

(Syllabus by Rittenhouse, C.)

Error from County Court, Craig County;
S. F. Parks, Judge.

Action by Louis Zeno against Charles Bazzell and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded for new trial.

Plaintiff sued on a note for \$500 alleged to have been made by the defendants Charles Bazzell and Clem Huelsenkamp to Will Devine and by Will Devine indorsed for a valuable consideration to the plaintiff, Louis Zeno. The note was alleged in the petition to have been dated March 25, 1910, and to have been payable in 60 days after date. The copy of the note, attached to the petition as an exhibit, also bore date of March 25, 1910.

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The petition alleged that the note was due and unpaid at the time suit was instituted, which was August 13, 1910. Defendants Bazzell and Huelsenkamp answered, admitting the execution of the note sued on as set forth in plaintiff's petition, and defended upon certain alleged grounds of fraud, which is not involved in this appeal. Issues were joined, the cause called for trial, plaintiff offered in evidence the note sued on, and it was found to be dated March 25, 19—, the date of the year being left blank. Will Devine was called as a witness, identified the note as the note given to him by the defendants Charles Bazzell and Clem Huelsenkamp, and said note was offered in evidence, but excluded on the ground that there was a fatal variance between the note sued on and the one offered in evidence. The plaintiff saved his exceptions and rested. After a motion for new trial was filed and denied, and the case comes here for review.

Seymour Riddle, for plaintiff in error.

Wm. P. Thompson, for defendants in error.

Opinion by RITTENHOUSE, C. (after stating the facts as above). The question presented by the several assignments of error is whether or not the court erred in excluding the note from the jury on the ground that there was a fatal variance between the note pleaded and the one offered in evidence. Comp. Laws 1909, secs. 5673 and 5674 (Rev. Laws 1910, secs. 6062 and 6063), provides:

"Section 5673: No variance between the allegations in a pleading and the proof, is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits.. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just."

"Section 5674: When the variance is not material, as proved in the last section, the court may direct the fact to be found, according to the evidence and may order an immediate amendment without cost."

From an examination of the record, we cannot see how the defendants could have been misled in their defense by reason of this slight variance. They had already admitted in their answer the execution of the note sued on and were defending on the grounds of fraud. Under these circumstances, it could not be said that the slight variance in the date of this note misled the defendants to their prejudice in their defense; that they were so misled must be proved to the satisfaction of the court, and it must be shown in what respect they have been misled, as provided by section 5673, *supra*. They could neither allege nor prove in this action that they were misled, when they had already admitted the execution of the note sued on.

"In the various states in which the code system, as contradistinguished from the common-law system, prevails, the rule as to variance is that it must be such as to mislead the adverse party to his prejudice in maintaining the action or defense on the merits." (13 Enc. of Ev. 646.)

C. R. I. & P. Ry. Co. v. Bankers' National Bank, 32 Okla. 290, 122 Pac. 499; *Short v. McRae*, 4 Minn. 119 (Gil. 78).

Where the facts which warrant a judgment for the plaintiff have been clearly alleged, and the defendants have admitted the execution of the note, an objection to the introduction of the note in evidence on the ground that there was a fatal variance, because the original note was dated March 25, 19—, and the note attached to the petition was dated March 25, 1910, is a frivolous objection, and the trial court erred in sustaining the same.

For the reasons assigned, the judgment of the trial court should be set aside, and the cause reversed and remanded for a new trial.

By the Court: It is so ordered.

PRATT v. PRATT.

No. 3524. Opinion Filed February 28, 1914.

(139 Pac. 261.)

1. **APPEARANCE—General Appearance—Motion to Vacate.** Where a party against whom a judgment is rendered files a motion to vacate the judgment upon the ground that the court has no jurisdiction of the defendant, and said motion is based upon nonjurisdictional as well as jurisdictional grounds, held, that thereby said party enters a general appearance as though said appearance had been made at the trial. *Ziska v. Avey*, 36 Okla. 405, 122 Pac. 722.
2. **DIVORCE—Petition—Sufficiency.** In an action brought for a divorce, a petition which embodies the essential averments for a divorce on the grounds of abandonment is sufficient. A petition which alleges the marriage contract, that the plaintiff had been a resident of Oklahoma for one year prior to the date of filing plaintiff's petition and an actual resident in good faith in the county in which the action was brought, and said petition shows that defendant abandoned plaintiff for more than a year prior to the filing of said petition, without cause or provocation, sufficiently states a cause of action.

(Syllabus by Rittenhouse, C.)

Error from District Court, Canadian County;
Geo. W. Clark, Judge.

Action by Charles H. Pratt against Nellie H. Pratt. Judgment for plaintiff, and defendant brings error. Affirmed.

On the 18th day of April, 1906, the defendant in error Charles H. Pratt, brought an action for divorce on the grounds of abandonment, against the plaintiff in error, Nellie H. Pratt, in the district court of Canadian county, Okla., and procured service by filing an affidavit for service by publication. The notice was published in the El Reno Democrat on June 4, 1906. Judgment was rendered in favor of defendant in error on the 19th day of November, 1906. No motion for new trial was filed. Afterwards, on the 20th day of March, 1911, the plaintiff in error filed a motion to vacate the judgment on the following grounds: First, because the affidavit for publication is insufficient to authorize any judgment rendered herein; second, be-

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cause the petition does not state facts sufficient to constitute a cause of action; third, because no service of publication, or any service, was had on the defendant; fourth, because of errors patent of record in this action; fifth, because the court had no jurisdiction of the person of the defendant, and said decree of divorce was rendered by the court when same was without authority of law to try said cause. This motion was by the court overruled and exceptions allowed, and the plaintiff in error brings the case here for review, assigning as error the action of the court in overruling said motion.

W. M. Wallace, for plaintiff in error.

Phelps & Cope, for defendant in error.

Opinion by RITTENHOUSE, C. (after stating the facts as above). This case is similar in many respects to the case of *Ziska v. Arvey et al.*, 36 Okla. 405, 122 Pac. 722, the assignments of error presenting only two questions: First, that the court did not have jurisdiction of the defendant; and, second, that the petition did not state a cause of action; and in that case it was held:

"Where a party against whom a judgment is rendered files a motion to vacate the judgment upon the ground that the court has no jurisdiction of the defendant, and said motion is based upon nonjurisdictional grounds as well as jurisdictional grounds, *held*, that thereby said party enters a general appearance as though said appearance had been made at the trial. In an action to quiet title brought in the district court, where the defendant is served by publication, and judgment is entered according to the prayer of the petition, and where the defendant, constructively served, afterwards appears and files a motion in the original action to vacate and set aside the judgment rendered, and which motion is based upon both jurisdictional and nonjurisdictional grounds, it will be deemed and held that a general appearance is entered, and that any defects in the service are waived, and the judgment rendered thereon validated."

Upon an examination of the record, we find that the plaintiff in error made a general appearance in the court below in putting in issue the question of the sufficiency of the petition.

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and plaintiff in error has thereby waived any defect in the service. This question has also been fully treated in the case of *Rogers v. McCord-Collins Mercantile Co.*, 19 Okla. 115, 91 Pac. 864, in which it was held:

“Where a motion is made in which questions are raised which go to the jurisdiction of the court over the parties, and in which questions are also raised which cannot be raised by special appearance, but can only be heard upon a general appearance, the parties will be taken and held to have entered a general appearance, and in such case defects in the service of summons will be deemed and held to have been waived, even though such appearance be made after judgment and upon a motion to vacate and set aside such judgment.”

The remaining question to be determined is whether the petition states facts sufficient to constitute a cause of action. The brief of plaintiff in error points out no sound reason why said petition in said divorce case does not state facts sufficient to constitute a cause of action, and we are unable to find any serious defects therein. The petition could have been more explicit, but the allegation “that on or about the 29th day of February, 1904, the defendant herein abandoned plaintiff without cause or provocation, and that said abandonment still continues,” is sufficient, in view of the fact that the record shows that the petition was filed over two years after such abandonment. It may be true that the allegation of abandonment could have been alleged in the petition with more care, but this court will not require that strict particularity of pleading when the question is raised on motion to vacate the judgment. *Thompson et al. v. Caddo County Bank*, 15 Okla. 615, 82 Pac. 927.

There being no other proposition presented to this court, the judgment of the district court overruling the motion to vacate should be affirmed.

By the Court: It is so ordered.

Howard Mercantile Co. et al. v. Squires, County Judge, et al.

HOWARD MERCANTILE CO. *et al.* v. SQUIRES.
County Judge, et al.

No. 3531. Opinion Filed February 28, 1914.

(139 Pac. 253.)

APPEAL AND ERROR—Dismissal—Brief. Where plaintiff has filed no brief, as required by rule 7 of this court (38 Okla. vi), the action will be dismissed for want of prosecution.

(Syllabus by Rittenhouse, C.)

Original petition for writ of prohibition by the Howard Mercantile Company, a corporation, and T. B. Howard, president, against A. L. Squires, County Judge of Ellis County, State of Oklahoma, and Ray Sutton, Sheriff of Ellis County, State of Oklahoma. Dismissed.

Chas. Swindall and *C. B. Leedy*, for plaintiffs.

W. H. Springfield, for defendants.

Opinion by RITTENHOUSE, C. This action was filed in this court January 22, 1912. Neither party has filed a brief, nor have they offered any excuse for the failure to do so. It is evident that the proceedings have been abandoned. This action should therefore be dismissed for want of prosecution, under rule 7 of this court (38 Okla. vi). *Wallingford v. Wood et al.*, ante, 139 Pac. 252.

By the Court: It is so ordered.

MONTGOMERY v. MONTGOMERY.

No. 3576. Opinion Filed February 28, 1914.

(139 Pac. 288.)

1. **DIVORCE—Time for Appeal—Division of Property.** That part of section 4971, Rev. Laws 1910, requiring that a party desiring to appeal from a judgment of the district court granting a divorce must within ten days after such judgment is rendered, file a written notice in the office of the clerk of such court, duly entitled in such action, stating that it is the intention of such party to appeal from such judgment, and requiring, further, that the proceeding in error be commenced within four months from the date of the decree appealed from, and not thereafter, applies only where it is sought to appeal from a judgment granting a divorce, and not where the appeal is prosecuted from an order awarding alimony or making a division of property in divorce proceedings.
2. **HUSBAND AND WIFE—Separation Agreement—Rescission and Cancellation.** A separation agreement procured by fraud or duress, or voidable upon other equitable grounds, is subject to rescission and cancellation in equity, the same as any other contract. Where the agreement is executed directly between husband and wife, it is also subject to the rules which control the contracts of persons occupying confidential relations, and is not binding upon the wife, unless it is just and equitable in view of all the circumstances existing at the time when it was executed.
3. **SAME—Division of Property—Prior Contract of Settlement—Burden of Proof.** In a suit for divorce and a division of property acquired through the joint efforts of the parties, when the husband sets up a prior written contract of settlement, entered into between himself and wife, as a defense against any further division of the property, he must be able to show, not only that it was entered into fairly and without misrepresentation, overreaching, or fraud, but also that its provisions are equitable and just under all the circumstances.
4. **SAME—Sufficiency of Evidence.** The evidence justified the court in annulling the contract of settlement entered into between the parties.

(Syllabus by Brewer, C.)

Error from Superior Court, Pottawatomie County;
Geo. C. Abernathy, Judge.

Suit by Dora B. Montgomery against W. G. Montgomery for divorce, custody of minor child, and division of property. Judgment for plaintiff, and defendant brings error. Affirmed.

Montgomery v. Montgomery.

S. P. Freeling and J. H. Woods, for plaintiff in error.

Blakeney & Maxey, for defendant in error.

Opinion by BREWER, C. The defendant in error, Dora B. Montgomery, as plaintiff below, filed this suit against her husband, W. G. Montgomery, in the district court of Pottawatomie county May 8, 1909. The suit is for divorce, the custody of a minor child, and for division of the property, which, it is alleged, was accumulated through the joint efforts of the plaintiff and the defendant.

The defendant denied the allegations of the petition, and also set up a contract for separation and division of the property theretofore made, and by a cross-bill asked for a divorce from the plaintiff. The plaintiff, in her reply, admitted that a written contract had been made, under the terms of which the defendant had set apart to her certain items of property, but alleged that same ought not to be allowed to stand, for the reason that she had been fraudulently induced to sign the same, had been overreached in the matter, had been intimidated and forced into signing the same, and that the contract was inequitable and unjust, and ought to be set aside, and a fair division of the property made in pursuance of the prayer made in her original petition.

The cause was tried in the superior court, and August 9, 1911, a decision was rendered in favor of the plaintiff, granting her a divorce, setting aside the former settlement as inequitable and unjust, granting plaintiff the custody of the minor child, finding that the property was the joint accumulation of the parties, and decreeing a certain division of the property involved.

On August 10, 1911, the defendant filed a motion for a new trial and to vacate and set aside the findings and judgments theretofore rendered, etc. This was overruled by the court on August 26, 1911, and the defendant was allowed time in which to make and serve a case-made, which was later done, and this appeal was filed in this court February 5, 1912. The record fails to show the filing of any notice in the office of the clerk of the court in which the judgment was rendered of the intention

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of the party to appeal; nor was the proceeding in error commenced in this court within four months from the date of the decree appealed from, as required by section 4971, Rev. Laws 1910. To have reviewed any question affecting the portion of the decree granting the divorce, the filing of the written notice of an intention to appeal with the clerk of the court in which the decree is rendered and within ten days thereafter is a mandatory prerequisite and is jurisdictional. *La Due v. La Due*, 23 Okla. 323, 100 Pac. 513; *Orcutt v. Orcutt*, 25 Okla. 855, 108 Pac. 373.

But it has been held in the case of *Lewis v. Lewis*, 39 Okla. 407, 135 Pac. 397, that the order of the court relating to the question of a division of the property is separable from the decree granting the divorce, and, where the appeal and assignments of error go solely to that portion of the judgment, that the appeal may be taken under the general provisions of law relating thereto. The *Lewis* case, *supra*, followed the Kansas case of *Kremer v. Kremer*, 76 Kan. 134, 90 Pac. 998, 91 Pac. 45, which rested on a very similar statute. The syllabus in the *Lewis* case is:

"That part of section 4971, Rev. Laws 1910, requiring that a party desiring to appeal from a judgment of the district court granting a divorce must, within ten days after such judgment is rendered, file a written notice in the office of the clerk of such court, duly entitled in such action, stating that it is the intention of such party to appeal from such judgment, and requiring, further, that the proceeding in error be commenced within four months from the date of the decree appealed from, and not thereafter, applies only where it is sought to appeal from a judgment granting a divorce, and not where the appeal is prosecuted from an order awarding alimony or making a division of property in divorce proceedings."

The point argued and urged here goes to the action of the court in vacating and setting aside the written contract of settlement as to property, entered into between the parties about a year before the suit was filed. The finding of the court incorporated in the decree follows:

"And the court finding that the contract of the date of 23d of July, 1908, was unfair, and its execution was obtained unfairly and is unreasonable, and that, in the execution of the

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same, the defendant overreached the plaintiff and intimidated her by statements that he had or could, if necessary, place his property beyond her reach, unless she made settlements with him, and that the same ought to be set aside and canceled."

We have examined the evidence with care and believe that the finding is amply supported.

The trial court had the witnesses before him, and was justified in believing those that appeared to be the most credible. He accepted the statement of Mrs. Montgomery, supported by her daughter and niece, that Mr. Montgomery had frequently stated to her that he had placed his property in such condition that she could not reach it, and that she had better take just what he was willing to give her; that he habitually brought in notices from the papers and reports showing that the wife had been deprived of any alimony in divorce suits; that Mrs. Riggs had gotten \$20, and that she would get less; that he had been advised by attorneys that he could place his property beyond her reach; that he had made arrangements with the best firm of lawyers in Oklahoma City, by which he could merely telephone to them and his property would be placed beyond her reach; that she was wholly inexperienced in business, that her husband was a shrewd and successful business man, etc. These parties occupied a confidential relation. The husband was an experienced and successful business man. He had for many years controlled the affairs and property of the parties. In dealing with and making a settlement with his wife, the law, good morals, and good conscience required that he act with scrupulous fairness. The court did not believe he had fully discharged this duty, nor does this court.

It is stated in 25 A. & E. Ency. of Law, at page 474, as follows:

"A separation agreement procured by fraud or duress or voidable upon other equitable grounds is subject to rescission and cancellation in equity the same as any other contract. Where the agreement is executed directly between husband and wife it is also subject to the rules which control the contracts of persons occupying confidential relations, and is not binding upon the wife unless it is just and equitable in view of all the circumstances existing at the time when it was executed."

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The relation of husband and wife existing, the contract was executed between the parties occupying a confidential relationship, and the burden is upon the husband to establish that it was entirely fair and equitable. *Cheuvront v. Cheuvront*, 54 W. Va. 171, 46 S. E. 233; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Switzer v. Switzer*, 26 Grat. (Va.) 574. Mr. Justice Story, in his work on Equity Jurisprudence, vol. 1, p. 218, says:

"But by far the most comprehensive class of cases of undue concealment arises from such peculiar relation of fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of * * * husband and wife. * * * In these and the like cases, the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost good faith (*uberrima fides*) in all transactions between the parties. If there is any misrepresentation or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose, and pronounce the transaction as void, and the court will, as far as possible, restore the parties to their original rights."

Also in section 307, Mr. Story, in speaking of constructive frauds which arise from some peculiar confidence or fiduciary relation between the parties, says:

"In this class of cases there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto, stands independent of any such ingredients, upon a motive of general public policy; and it is designated in some degree as a protection to the parties against the effects of overweening confidence and self delusion, and the infirmities of hasty and precipitate judgment. Courts will therefore often interfere in such cases, where but for such a peculiar relation they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner."

These parties had lived happily together for many years. They had succeeded financially. The wife brought into the family several hundred dollars her father had given her. Their property was the product of their joint efforts. Late in life, with children nearly grown, dissensions arose which led to the separation. As is usual in such cases, each was partially to

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blame. They could not live together in peace and harmony, and the court, on all the evidence, gave the wife the decree and the minor child to raise. The settlement the husband had made with her, under all the circumstances, was inequitable and unjust. It would have left him in plenty and his wife almost in want. This ought not to be allowed. Ordinarily the man is the stronger and more capable of the two, and far abler to make his way. A woman old enough to have grown children, will find few avenues open to her for profitable endeavor. The court practically divided the property between them. We cannot say its action was either unwarranted or unjust.

The cause should be affirmed.

By the Court: It is so ordered.

J. P. BLEDSOE & SON v. KEYSTONE STEEL & WIRE CO.

No. 3588. Opinion Filed February 28, 1914.

(139 Pac. 257.)

1. **CORPORATIONS—Action by Foreign Corporation—Proof of Corporate Character.** Where a plaintiff alleges in the petition that it is a corporation organized under the laws of another state, and the defendant files a specific denial of plaintiff's corporate character duly verified, the plaintiff is required to make proof of the fact that it is a corporation.
2. **SAME—Corporate Character—Sufficiency of Evidence.** The evidence in this case is sufficient to show plaintiff's corporate character.

(Syllabus by Brewer, C.)

*Error from County Court, Stephens County;
W. H. Admire, Judge.*

Action by the Keystone Steel & Wire Company against J. P. Bledsoe & Son, a copartnership, composed of J. P. Bledsoe and George Bledsoe. Judgment for plaintiff, and defendants bring error. Affirmed.

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Gilbert & Bond, for plaintiffs in error.

D. M. Smith and *F. B. Allen*, for defendant in error.

Opinion by BREWER, C. On December 28, 1909, the Keystone Steel & Wire Company sued J. P. Bledsoe & Son for a balance of \$620, alleged to be due on a carload of wire and fence material. The plaintiff alleged that it was a corporation organized under the laws of the state of Illinois. On April 20, 1910, the defendants filed an answer consisting of a general denial. On October 3, 1910, the defendants filed an amended answer, which, in addition to a general denial, denied plaintiff's corporate character. The position of the defendants in this case is fully disclosed in the statement of counsel to the jury that the defense raises the question of plaintiff being a corporation: "We simply deny the corporation." This is all the defense they seem to have for not paying for goods received. Complaint is made here that the court erred in striking this amended answer, raising the question of corporate character, from the files; also, that the evidence is not sufficient to show that plaintiff is a corporation. The striking of the answer from the files, which was after judgment, needs no extended consideration, if in fact corporate character is shown by the evidence, as we think it is, and therefore we shall treat the case as though the answer raising the question had not been stricken, which course saves and reviews the only question material to defendants.

The denial of corporate existence is specific and verified by one of the defendants as a fact, although on the witness stand the party admits he had no knowledge of the matter. Still, in this situation it was incumbent on plaintiff to make a showing of its corporate character. We think this is sufficiently shown.

It is shown by the certificate of the Secretary of State for the state of Illinois, with copy of charter annexed, that the "Keystone Woven Wire Fence Company was duly incorporated under the laws of said state and certificate thereof issued July 30, 1892." It is also shown that the corporate name of this concern was later on changed to "Keystone Fence Company." It is also shown under the certificate and seal of the Secretary

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of State of Illinois that the "Atlas Wire Company" was duly incorporated under the laws of that state June 7, 1905. It is further shown by the certificate and seal of the Secretary of State of the state of Illinois that the two aforesaid corporations were consolidated under the name of "Keystone Steel & Wire Company," the name used in this suit, on July 20, 1907. To this certificate is attached a copy of the proceedings and resolutions by which the consolidation was effected. A certified copy of the law of Illinois is also in the evidence, relative to proceedings necessary to incorporate, to change the corporate name, and to effect the consolidation of two corporations. There is no attack made by counsel for defendants as to the original incorporation of the two parent companies, but it is claimed that the resolutions effecting the consolidation fail to show a legal consolidation under the name used in this suit. Several points are advanced, but the one principally relied on seems to be that the resolution of consolidation failed to show that the Atlas Wire Company had passed any resolution by its stockholders to authorize the action, and that this was necessary under the law in evidence.

We think the point is not well taken. The resolution of consolidation was evidently thought to be sufficient by the Illinois officers, as it was accepted and filed, and the corporation permitted to do business under it. Besides, a reading of the proceedings shows that the stockholders of the two corporations were present in joint meeting at the passage of the resolution and that the meeting was held in the office of the Atlas Company. There is some uncertainty about just what was done to effect the consolidation, and the resolutions to accomplish this purpose may be open to some criticism; but we think, under all the evidence, that it is sufficiently shown that the present defendant in error, plaintiff below, was and is an existing corporation organized and doing business under the laws of the state of Illinois.

The judgment does substantial justice, except that in our judgment it has been too long delayed. The cause should be affirmed.

By the Court: It is so ordered.

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LAURIE *et al.* v. CROUCH *et ux.*

No. 3632. Opinion Filed February 28, 1914.

(139 Pac. 304.)

1. **HOMESTEAD—Selection—Exemption.** The bare intention to create a home on a vacant lot at some future time, unaccompanied with actual occupancy of the lot, is not sufficient foundation upon which to base a claim of homestead exemption against an execution.
2. **SAME.** Where there is a fixed intention by the owner of a lot to presently occupy it as a home, accompanied with overt acts, which clearly manifest such intention, such as fitting up, building, or repairing a house thereon for occupancy, followed by actually moving therein, without unreasonable delay, it might have the effect, at least in equity, of impressing the homestead character, so as to render the property exempt as against claims arising prior to actual occupancy by the family.

(Syllabus by Brewer, C.)

Error from District Court, Tillman County;
J. T. Johnson, Judge.

Action by J. H. Crouch and wife against A. J. Laurie and Frank Carter, Sheriff, for injunction. Judgment for plaintiffs, and defendants bring error. Reversed and remanded, with directions.

Wilson & Roe and *W. E. Lindblad*, for plaintiffs in error.

Hudson & Mounts and *H. P. McGuire*, for defendants in error.

Opinion by BREWER, C. On March 2, 1911, the district court of Tillman county made an order permanently enjoining the plaintiffs in error from selling, under execution, lots 11 and 12, block 28, Doneghy addition to the town of Grandfield, on a petition filed by J. H. Crouch and another, based on the claim that such lots comprised his homestead. This appeal is prosecuted to have this final order come under review. The defendants in error, Crouch and wife, plaintiffs in the court below, have filed no brief. The only question necessary for us to pass

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upon is whether the court was justified, under the evidence, in holding that the lots in controversy had been impressed with the homestead character. If so, the order should stand. If not, it should be set aside.

From the abstract of the evidence, it appears that Crouch, who was a physician, bought five vacant lots, built a cheap stable or shed on two of them, in which he kept his horse for a time; that he contracted for them in 1909, and procured full title January 8, 1910; that he sold three of the lots, and paid the proceeds on the five bought. There was no dwelling house on any of the lots, nor were they at any time occupied by Crouch and wife as a home. Crouch, however, testified that, when he bought them, he intended at some future time to build a home on them. There is evidence that he tried to sell the two lots involved here, and at one time had a notice that they were for sale posted on the lots. The execution was levied on the lots on February 11, 1910, and was for the satisfaction of a judgment against Crouch and in favor of Laurie. Carter made the levy as sheriff, and is only concerned here in his official capacity.

Will the naked intention to build a house on vacant lots at some indefinite future time for use as a homestead be sufficient to exempt such lots from execution? We think not. The statute relating to homestead exemptions in force prior to statehood was construed by the territorial Supreme Court in *Ball v. Houston et al.*, 11 Okla. 233, 66 Pac. 358. The syllabus is:

"For the purpose of its creation or inception, the occupancy must be actual, but when the premises have become invested with the homestead character, and the homestead has been once acquired, a constructive occupancy may be sufficient to retain it, and it will not be lost by a temporary absence with no intention of abandonment. The statute exempts only the homestead in fact, the place of the home; it does not undertake to exempt a contemplated future homestead, and therefore the mere intention to occupy the premises at some future time as a home, without actual occupancy, is insufficient to impress upon them the homestead character."

But the language of the Constitution which was adopted differs somewhat from the statute considered in that opinion.

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The portion of the law construed in the Ball case, *supra*, relating to homestead in cities, towns, and villages is:

"* * * The homestead in a city, town or village, consisting of a lot or lots, is not to exceed one acre with the improvements thereon; provided, the same shall be used for the purpose of a home for the family. * * *"

The Constitution (article 12, sec. 1) since adopted provides:

"* * * The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner. * * *"

This constitutional provision is embraced in section 3343, Rev. Laws 1910. A homestead is exempt from seizure and sale under execution or attachment or other species of forced sale, except under certain circumstances, by section 3342, Rev. Laws 1910.

In so far as the precise question we are dealing with is concerned, there does not seem to be very much difference between the present law and that in force in Oklahoma Territory. Both seem to contemplate occupancy as a home, as necessary to impress, in the first instance, the homestead character. Both the old and the new law provide that, if this character has once attached, no temporary renting of the homestead shall change its character as such; and, under our own decisions and, in fact, those of nearly all the states, statutes exempting homesteads should be liberally construed (*Irwin v. Walling*, 4 Okla. 128, 44 Pac. 219); but it is thought that the bare claim of intention to create a home on a vacant lot at some indefinite time in the future, unaccompanied with actual occupancy, would not of itself be sufficient foundation upon which to base a claim of homestead exemption.

The state of the law is very clearly set forth in A. & E. Ency. of Law, vol. 15, p. 575, as follows:

"Having in view the very meaning of the word 'homestead' and the policy of the homestead exemption provisions in the various constitutions and statutes, it may be laid down as a general rule that premises of a debtor do not constitute his homestead, and are not exempt as such, unless they are actually occupied and used by him as a residence or home for himself and his family, or, in some jurisdictions, unless there is at least a

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bona fide and clearly defined and manifest intention to apply them to such use within a reasonable time. In many states occupancy is expressly required by the constitution or statute. In others it is held necessary though not expressly required."

As sustaining the rule that occupancy is required, the author cites a vast array of cases from the states of Alabama, Arkansas, California, Dakota, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, Ohio, and Texas. But, as said at page 578, vol. 15, A. & E. Ency. of Law:

"In other jurisdictions actual physical occupancy is not always necessary, but it is held, even where 'occupancy' is required by the constitution or statute, that a *bona fide* and clearly defined present intention to acquire and occupy certain premises as a homestead, evidenced by overt acts in fitting them up for such a purpose, and followed within a reasonable time by actual physical occupancy, the delay being only for the time necessary to effect removal to the premises, or to build needed improvements or repairs, or to complete a dwelling house in process of construction, or the like, renders the land exempt as a homestead from the time of its acquisition with such intent."

And we are led to believe that, under a liberal rule of construction, situations may be presented where the fixed intention to presently occupy a place as a home, accompanied with overt acts of preparation, such as fitting up or building or repairing a house for occupancy, followed by actually removing therein, without unreasonable delay, would have the effect, at least in equity, of impressing the homestead character, so as to render the property exempt against claims arising prior to actual occupancy. No such situation is, however, presented here, and we conclude that the court erred in granting the injunction in this case, and the cause must therefore be reversed and remanded, with instructions to vacate the order of injunction.

By the Court: It is so ordered.

UNIVERSITY REALTY CO. v. ENGLISH.

No. 3197. Opinion Filed November 18, 1913. Publication Withheld

Until February 28, 1914.

(139 Pac. 516.)

1. **APPEAL AND ERROR—Presentation for Review—Denial of New Trial.** The action of the lower court in overruling the motion for a new trial cannot be reviewed by this court by means of a transcript of the record.
2. **SAME—Motion for New Trial—Record.** A motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal.
3. **SAME—"Record."** The record in a case shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court.

(Syllabus by Robertson, C.)

*Error from Superior Court, Garfield County;
Dan Huett, Judge.*

Action by W. W. English against the University Realty Company to recover commission for sale of real estate. Judgment for plaintiff, and defendant brings error. Affirmed.

Parker & Simons, for plaintiff in error.

McKeever & Church, for defendant in error.

Opinion by ROBERTSON, C. This is an appeal by plaintiff in error by transcript of the record. Three assignments of error are raised in the petition in error, viz.:

"(1) The trial court erred in overruling the motion of defendant for a new trial. (2) The trial court erred in giving to the jury instruction No. 3 of the general charge. (3) The trial court erred in overruling the second, third, fourth, and fifth grounds of defendant's motion to make the petition of plaintiff more definite and certain."

The action of the lower court in overruling the motion for a new trial cannot be reviewed by this court by means of a transcript of the record. *Schoolmyer v. Van Buskirk*, 35 Okla.

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439, 130 Pac. 138; *Richardson v. Beidleman*, 33 Okla. 463, 126 Pac. 818; *Laird v. Bannon*, 31 Okla. 627, 122 Pac. 180. A motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal. *Ludwig v. Benedict*, 33 Okla. 300, 125 Pac. 739; *Tribal Development Co. v. White Bros.*, 28 Okla. 525, 122 Pac. 736; *Davis v. Lammers*, 23 Okla. 338, 100 Pac. 514.

Whether or not there was error in the action of the trial court, as set up in assignment of error No. 2 of the petition in error, we cannot say, inasmuch as this would be an error of law occurring at the trial, and to be saved for review in this court would necessitate its presentation to the lower court by motion for new trial; and, as has been seen, this appeal coming by transcript, without case-made or bill of exceptions, we are precluded from further examination into the alleged error.

The record in a case "shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court." (Section 5146, Rev. Laws 1910.)

In *Menten v. Shuttee*, 11 Okla. 381, 67 Pac. 478, it was said:

"Motions presented in the trial court, the rulings thereon, and exceptions are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same into a bill of exceptions or case-made. The record proper in a civil action consists of the petition, answer, reply, demurrers, process, rulings, orders, and judgment; and incorporating motions, affidavits, or other papers into a transcript will not constitute them a part of the record, unless made so by a bill of exceptions. Motions and proceedings which are not part of the record proper can only be presented for review by incorporating them into a case-made, or by preserving them by bill of exceptions, and embracing them in the transcript."

In 2 Thompson on Trials, sec. 2712, it is said:

"The motion is necessary to enable the court to correct such errors, occurring at the trial, as do not appear on the face of the record proper, as where it is insisted that there is no evidence to support the verdict, or that the verdict is against the law and evidence, or that the evidence does not authorize the judgment, or that there is an error in the verdict of the jury.

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or where it is alleged that the court erred in matter of law, either in admitting or rejecting evidence, *or in giving or refusing instructions.*" (Italics ours.)

To the same effect, see *McMechan v. Christy*, 3 Okla. 301, 41 Pac. 382; *Black v. Kuhn*, 6 Okla. 87, 50 Pac. 80; *Kingman & Co. v. Pixley*, 7 Okla. 351, 54 Pac. 494; *McCarthy v. Bentley*, 16 Okla. 19, 83 Pac. 713; *Devault et al. v. Merchants' Exch. Co.*, 22 Okla. 624, 98 Pac. 342; *Green et al. v. Incorporated Town of Yeager*, 23 Okla. 128, 99 Pac. 906; *Lamb et al. v. Young et al.*, 24 Okla. 614, 104 Pac. 335.

What has been said relative to the foregoing assignments of error is likewise applicable to the third. This leaves for our examination the pleadings and the judgment of the court. The judgment appears to be regular in all things, and the allegations of the petition are sufficient to sustain the same; therefore the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

BRUSHA et ux. v. BOARD OF EDUCATION OF
OKLAHOMA CITY.

No. 2561. Opinion Filed April 4, 1913.

Rehearing Denied March 10, 1914.

(139 Pac. 298.)

1. **ESTOPPEL—Equitable Estoppel—Sale of Homestead—Right to Recover.** A school board purchased from a husband, before he had made final proof, about three acres of a quarter section entered and occupied as a homestead. He executed a quitclaim deed, received the consideration, and delivered possession of the land to the school board; but his wife did not join in the deed, as required by section 1627, St. Okla. 1893, in force at the time the conveyance was made. The board built a schoolhouse, and otherwise improved the property at a considerable expense, without objection by either husband or wife, and remained in possession for a number of years, without any assertion of title to the land by either husband or wife. **Held**, that both husband and wife are estopped from recovering the property.

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2. **ESTOPPEL—Married Women—Removal of Disability.** A married woman is under no disability by reason of coverture in this state, and is subject to the same rule of estoppel as any other person *sui juris*.

(Syllabus by Rosser, C.)

Error from District Court, Oklahoma County;
James W. Steen, Assigned Judge.

Action by John W. Brusha and another against the Board of Education of Oklahoma City. Judgment for defendant, and plaintiffs bring error. Affirmed.

S. A. Horton, for plaintiffs in error.

Everest, Smith & Campbell, for defendant in error.

Opinion by ROSSER, C. This was an action by John W. Brusha and his wife, Ollie Brusha, against the board of education of Oklahoma City to recover certain land in the possession of the board of education, upon which land a school building has been built. John W. Brusha settled upon a quarter section of land, of which the land in controversy is part, on the 22d of April, 1889, at the time of the opening of land in Oklahoma county for settlement, and contested a homestead entry on the land made prior to his attempted entry. He remained on the land, cultivating and improving it, from the time of settlement until he moved away in 1900. He was successful in his contest, and on the 13th of February, 1895, he submitted final proof, and on the 17th of April, 1895, received a final certificate for the land, and a patent was issued to him on June 18, 1895. On the 1st of March, 1892, he married the plaintiff Ollie Brusha, and she immediately took up her residence on the land with the plaintiff, her husband, and continued to reside there until about 1900, when they both moved to Pottawatomie county, and purchased land upon which they have since resided, and which is now their homestead, and exempt to them under the laws of the state. On the 17th of May, 1894, prior to the time of his entry at the land office, and prior to the issuance of the patent or receiver's certificate, the plaintiff John W. Brusha executed and delivered to the board of education a quitclaim deed to the

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land in controversy, consisting of a little over three acres of the homestead entry. His wife did not join in this deed, but knew, the next day after it was executed, that her husband had executed it. The board of education paid him a consideration of \$600, which he received and expended just as he did any other money coming into his hands, and no particular portion of said money was ever paid or delivered to Ollie Brusha.

At the time the deed was made, and the money paid, Brusha delivered the possession of the land to the board of education. It immediately proceeded to erect a brick schoolhouse, two stories in height, with basement, at a cost of \$40,000, and from time to time improved the tract by planting trees, building fences, constructing walks, digging a well, and in other ways. The land was purchased to be used for school purposes, and has always been and is now used by the board of education for school purposes, and for no other purpose. At the time the possession was delivered to the defendant, the plaintiff Ollie Brusha was residing upon the quarter section of which the part sold to the defendant was a portion, and knew of the deed and transfer, and permitted the board to take possession, and permitted the erection of the building, without taking any action to apprise the board of education, or any of its officers, that she claimed any right, title, or interest in the tract of land.

The board of education at the time of the purchase knew that Ollie Brusha was the wife of John W. Brusha, and that she and her husband, with their family, were residing on the premises at the date of the erection of the school building and other improvements. At the time John Brusha made final proof he testified before the land office, among other things, as follows:

"Q. (12) Have you sold, conveyed, or mortgaged any portion of the land, and, if so, to whom, and for what purpose?
A. None, except selling about $2\frac{1}{2}$ acres for public schools under section 2388, Revised Statutes of the United States."

On the 31st day of October, 1895, the Brushas made a deed to John C. Schalles. On the 18th of October, 1897, John C. Schalles and Elizabeth Schalles, his wife, executed a deed to

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H. T. Parlier. On the 18th of April, 1898, H. T. Parlier executed a deed to Ollie Brusha, excepting therefrom the tract which had been conveyed to the board of education and some other small portions. These instruments were placed of record.

The plaintiff denied that the deed to Schalles was ever delivered, and testified that it had always remained in the possession of the plaintiff John W. Brusha. The plaintiff John W. Brusha testified, however, that he executed the deed to Schalles in order to avoid trouble with a man named Jones. He testified, also, that he requested Parlier to make the deed to the plaintiff Ollie Brusha. Schalles and Parlier also testified with reference to these deeds, stating that the deeds executed to them and by them respectively were made without consideration, and were not intended to pass title.

It is contended by plaintiffs that the land became homestead at the time Brusha married, and he and his wife began occupying the land as husband and wife, in 1892. They contend that, as they had resided on the land five years prior to the giving of the deed, they were the equitable owners of the land at the time the deed was made. And they contend that, as the land was homestead, section 1627, St. Okla. 1893, governed as to the manner of conveying, and that a conveyance by the husband, his wife not joining in the deed, carried no title. Section 1627 is as follows:

"All instruments conveying or affecting the title to the homestead exempted by law to the head of a family, shall be void unless the husband and wife sign and acknowledge one and the same joint instrument conveying the same."

It is contended by the defendant that the land was of a homestead character at the time of the conveyance, the title still remaining in the government, and the husband as a settler had a right, under the provisions of section 2288, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 1385), to convey the land for school purposes without joining his wife in the deed. Section 2288, Rev. Stat. U. S., is as follows:

"Any *bona fide* settler under the pre-emption homestead or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads,

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canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect title to his claim."

Defendant in error further contends that plaintiffs have no title because, admitting that the transfer to the defendant was ineffective to convey title, the plaintiffs conveyed the entire tract to Schalles, and received a reconveyance through Parlier, which excepted from the deed the portion occupied by the defendant.

Defendant further contends that plaintiffs are estopped by laches from asserting any right in the land, and they also contend that plaintiffs, by permitting the land to be used for school purposes, dedicated it for public use, and cannot now assert title.

It seems clear from the reading of the record in this case that a great injustice will be done the school board and the people of the school district if the plaintiffs recover in this action. The defendant paid for the land. It is not claimed that the amount paid was not an adequate compensation. In addition to the amount paid, it has expended a large sum for improvements, and the property is now a necessary part of the large school system of Oklahoma City. If plaintiffs should recover, the defendant would in all probability commence condemnation proceedings for the land at once.

Section 2288, Rev. Stat., *supra*, gave the right to sell for school purposes before final proof. It is not necessary to decide whether, under this section, John Brusha had the right to sell without joining his wife in the deed. John Brusha believed at the time he made final proof that his conveyance carried title. He testified before the land department that he had sold the land for school purposes as authorized by the statute.

It is not necessary, either, to decide whether it is necessary for a wife to join in a deed or other conveyance of a portion of her homestead for school or other public purposes. It has been decided that a conveyance to a railroad company of a right of way over a homestead by a husband, by an instrument in which the wife does not join, is good where such conveyance does not defeat the substantial enjoyment of the homestead as such. *Chicago, etc., R. Co. v. Swinney*, 38 Iowa, 182; *Ottumwa, etc., R.*

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Co. v. McWilliams, 71 Iowa, 164, 32 N. W. 315; *Randall v. Texas Cen. R. Co.*, 63 Tex. 586. A very strong argument can be made in favor of the right of the husband to convey, without the concurrence of his wife, for public purposes such portions of the homestead of which he holds legal title as could be taken for the same public purposes under the right of eminent domain. But this statement is not made, nor are the last-cited cases referred to, to show that the law permits such conveyances, but to show that the school board was not itself guilty of such laches and negligence in accepting the conveyance of the husband and taking possession of the land and improving it as to prevent it from asserting an estoppel against the plaintiffs. The deed, together with the acquiescence of the plaintiffs, and the public character of the use to which the property was put, justified the school board in making the improvements. As will be shown, an estoppel in favor of a public interest will be raised upon slighter circumstances than in cases of controversies between private individuals.

What, then, is the position of the plaintiffs? The husband's attitude does not require serious consideration. He gave the deed, received the consideration, and placed the defendant in possession of the land. He knew it was bought for school purposes, and made no objection when the board was building the schoolhouse, and making the other improvements. On the contrary, he informed the officials of the land office that he had sold the land. At that time he was willing that his conveyance be considered a valid one. Never, so far as appears from the record, did he make any claim to the land prior to the bringing of this action. He is estopped by the plainest principles of equity.

"Equitable estoppel is therefore a particular doctrine, based upon justice and conscience, which is the origin, wherever it may be invoked, of primary rights of property or of contract." (Pomeroy's Eq. Juris. sec. 801.)

"Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion of enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and

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fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." (Pomeroy's Eq. Juris. sec. 802.)

Section 818, Pomeroy's Eq. Juris., is as follows:

"Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention of this class, in equity, rests upon the principle. If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A., stands by and knowingly permits another person, B., to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like. Of course it is essential that B. should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealings."

See *Wampol v. Kountz*, 14 S. D. 334, 85 N. W. 595, 86 Am. St. Rep. 765, and cases cited in note; *Roeder v. Fouts*, 5 Wash. 136, 31 Pac. 432.

It seems that, when property is taken for public use, it is not necessary, in order to enable the taker to invoke the doctrine of estoppel against the owner, that he should have been acting in ignorance of the real condition of the title. The rule has often been applied in cases where railroads have taken property, and where they could not have acted in ignorance of the owner's title.

In the case of *Hendrix v. Southern R. Co.*, 130 Ala. 205, 30 South. 596, 89 Am. St. Rep. 27, the second paragraph of the syllabus is as follows:

"The constitutional and statutory requirements respecting the conveyance of a homestead apply only when the contractual disposition of such property is sought to be made; such statutory provisions do not prevent the creation of an equitable estoppel by acts or declarations made by the owner of such property."

The third paragraph of the syllabus is as follows:

"Where a deed conveying a right of way to a railroad company is invalid by reason of its not being executed as required

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by the statute to convey a homestead, but the owner of said homestead allows the railroad company to proceed to locate and construct its road on his lands, and to expend large sums of money for this purpose, and in the improvement of its road and right of way, without interfering or forbidding it to proceed, such owner is equitably estopped from asserting title in the land so occupied by the railroad company for the purpose of maintaining a suit which would take from the said company its improvements, as well as the easement for the operation of its trains."

In the case of *Reichert v. Railway Co.*, 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183, the third paragraph of the syllabus lays down the same rule as in the case of *Hendrix v. Southern R. Co.*, 130 Ala. 205, 30 South. 596, 89 Am. St. Rep. 27. In the course of the opinion the court said:

"By authority and upon principle, it would seem that original consent of the owner and his subsequent unreasonable acquiescence should be viewed alike."

In the case of *Dodd v. St. L. & H. R. Co.*, 108 Mo. 581, 18 S. W. 1117, the same principle was enunciated. The court said:

"And it is equally well settled that a party who, with full knowledge, stands by and permits a company to expend large sums of money in the construction of a railroad through his land, without objection, forfeits his right of ejectment. *Kanaga v. Railroad*, 76 Mo. 207; *Provolt v. Railroad*, 57 Mo. 257; *Masterson v. Railroad*, 72 Mo. 343; [*Reichert v. St. L. & S. F. R. Co.*, 51 Ark. 491, 11 S. W. 696] 5 L. R. A. 183, and notes. This right is forfeited by virtue of the application of the doctrine of estoppel as well as the intervention of public interests."

The general doctrine with reference to railroads is laid down in the following cases: *Taylor v. C., M. & P. R. Co.*, 63 Wis. 327, 24 N. W. 81; *Baltimore & O. R. Co. v. Strauss*, 37 Md. 237; *Chicago, R. I. & P. Ry. Co. v. Joliet*, 79 Ill. 25; *L. & N. R. Co. v. Pittsburgh & K. Coal Co.*, 111 Ky. 960, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447; *B. & O. R. Co. v. Strauss*, 37 Md. 237; *Scarritt v. K. C. S. R. Co.*, 127 Mo. 298, 29 S. W. 1024; *Planet P. & F. Co. v. St. L., etc. R. Co.*, 115 Mo. 613, 22 S. W. 616; *Morgan v. C. & A. R. Co.*, 96 U. S. 716, 34 L. Ed. 743; *Roberts v. N. Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

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No sufficient reason can be given why the same doctrine should not be applied in favor of the defendant in this case. The school board had the right to condemn the land. St. Okla. 1893, sec. 5776. The plaintiffs could not have prevented the board from taking the land upon making just compensation. Having permitted the board to enter and build the school buildings, and make other improvements, they are in the same attitude as the plaintiffs in those numerous cases just cited, in which a railroad company was the defendant.

The wife, Ollie Brusha, is in no better condition to maintain this action than her husband. She knew of the sale by her husband. She took no action to prevent the school board from taking possession. She did not demand that her husband return the consideration. She never at any time notified the school board not to make improvements on the land. She never claimed any rights as against her husband's deed. It is argued that by joining in the deed to Schalles she asserted ownership. It is difficult to reconcile this with her statement and the statement of the other witnesses in the case that the deed to Schalles was not intended to convey anything. If she and her husband were to retain the deed, and never intended to deliver it, the contents of the deed no more asserted ownership than if the two plaintiffs had whispered each to the other as they sat together at their fireside: "We are the owners of that land in possession of the school board." It is hard to believe that they intended to take such a roundabout method of claiming ownership, when a letter making the claim could have been written with much less trouble. The fact that Mrs. Brusha accepted a deed back from Parlier to the balance of 160, from which deed the land to the school board was expressly excepted, is a very strong indication that she did not at that time claim any interest in the land. Common honesty demanded that she make ~~the claim~~ if she expected to try and recover the land. She is ~~c/topped~~ by her silence and apparent consent to the transfer from recovering the land now, after the lapse of all these years, and ~~aft~~er the large expenditure which the board has made in reliance upon and on the faith of her husband's deed.

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In section 814 of Pom. Eq. Juris., the rule with reference to estoppel, as applied to married women, is stated as follows:

"Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the indorsement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense. There are, however, decisions which hold, in effect, that, since a married woman cannot be directly bound by her contracts or conveyances, even when accompanied with fraud, so she cannot be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct, upon which the other party has relied. These decisions seem to be in opposition to the general current of authority."

The statutes of Oklahoma remove all disabilities from married woman. Section 3655, Comp. Laws 1909 (section 2978, St. Okla. 1893 [Rev. Laws 1910, sec. 3363]), provides that a woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of her rights as a woman that her husband does as a man, and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone, provided that this act shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law.

This is broad language. The proviso that the wife shall not be allowed to vote or hold office emphasizes the preceding portion of the statute, to the effect that she has in other matters the same rights as a man. Rights and duties are correlative. If

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the wife had made a deed to the land in question, and the husband had permitted the school board to take possession of the property and erect improvements, would any one deny that he was thereby estopped from asserting rights in the land?

Section 5561, Comp. Laws 1909 (Rev. Laws 1910, sec. 4684), provides that a married woman may sue and be sued in the same manner as if she were not married. Throughout the statute is manifested the intention to give the wife the same rights and standing in the community and in the courts with reference to her property as a man. If she has the same rights, she is charged with the same duties.

In the case of *Grice v. Woodworth*, 10 Idaho, 459, 80 Pac. 912, 69 L. R. A. 584, 109 Am. St. Rep. 214, Jay Woodworth, the husband, had listed the land for sale, and afterwards made an oral agreement with Grice to sell him the land for a certain sum. Grice entered into possession, and paid the greater portion of the consideration, and placed improvements on the land of the value of about \$250. Afterwards Grice demanded a deed to the land, and Woodworth refused to make it. The defense was that the land was homestead, and that the wife had not joined in the conveyance by executing and acknowledging the conveyance according to the statute of Idaho, which is practically the same as the statute of Oklahoma on the same subject. There was a judgment in the lower court in favor of the Woodworths, adjudging them to be the owners of the land. This case was reversed upon appeal. In the course of the opinion the court said:

"Sections 3040 and 3041 [the sections requiring the joint execution of a deed to the homestead] are in the nature of rules of evidence, and are subject to the same legal principles as are conveyances falling under the statute of frauds and the rules of equitable estoppel and waiver. We are aware that there is much conflict among the decisions of the question of how far the doctrine of equitable estoppel applies to married women. One of the leading decisions of the Pacific Coast states is that of *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593. See, also, cases cited in 1 Notes on California Reports, pp. 604 and 605."

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The court then quotes from section 814, Pom. Eq. Juris., quoted above, and then continues:

"The author cites modern English cases, as well as American, to sustain the text. In the case of *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, in referring to *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593, the Tennessee court says that the case of *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593, 'relied on so confidently by counsel for complainant, seems to not only deny the application of an estoppel *in pais* to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case that it not only loses sight of the distinction referred to as to defective execution of a contract, but is directly opposed to our own adjudged cases, so far as the element of fraud is concerned.' In *Pilcher v. Smith*, 2 Head (Tenn.) 208, it is said: 'The legal disability of coverture carries with it no license or privilege to practice fraud or deception on other innocent persons.'"

In the case of *Wilder v. Wilder*, 89 Ala. 414, 7 South. 767, 9 L. R. A. 97, 18 Am. St. Rep. 130, the court, speaking of the question of estoppel of married women, said:

"If she could be estopped in no instance, the morality of the law would be placed upon a very low plane, and the disability of coverture, instead of being, as it ought to be, a shield for her protection against legal wrong, would become a sword of injustice for the license of fraud."

In the case of *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, the court said:

"The contention is that, as a married woman cannot, in reference to her lands, bind herself by title bond, power of attorney, contract of sale, or even a deed, without privy examination and certificate of acknowledgment in a prescribed form, showing that it was done freely, voluntarily, and understandingly, it would be an anomaly in the law to hold that she might part with her title indirectly, when she had no purpose to do so, and when, instead of doing so freely, voluntarily, and understandingly, she was actually in ignorance, or laboring under a mistake of fact. And cases are cited which seem to sustain the contention. It must be admitted that the cases on this subject are to a certain extent conflicting. But much of the difficulty and confusion is due to a failure to observe the distinction between the cases which seek, by the doctrine of estoppel, to validate those contracts of a married woman which by law are declared void, and the cases

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where, in the absence of any contract or agreement, her conduct has been held to prevent her from asserting what would otherwise be a right. To the former class belongs the case of *Dodd v. Benthal*, 4 Heisk. (Tenn.) 601. And the language of the judge delivering the opinion in that case, at page 607, where he says, 'The complainant being both an infant and *feme covert* at the time of * * * the deed in question, no act of affirmance or disaffirmance *in pais* on her part during coverture could be binding upon her,' etc., is correct when confined to a contract of a person under disability, which by law is void in consequence of such disability. To the latter class above referred to belongs the case of *Howell v. Hale*, 5 Lea (Tenn.) 405. Here the conduct of the married woman, independent of any contract, operates to estop her in the same manner and to the same extent as if she were a *feme sole*. So in the case at bar, while there are facts and circumstances upon which a contract might be implied that would be binding upon a person *sui juris*, yet there are also such admissions, statements, and conduct on the part of the complainants and their ancestors as are amply sufficient to create an estoppel entirely independent of, and altogether outside of, any idea or claim of a contract."

The distinction to be made is that, where the general disabilities of a married woman have not yet been removed, and the statute only confers the power to make certain specific contracts or conveyances, and requires certain formalities in the making of those contracts or conveyances, a married woman cannot be estopped, at least in the absence of fraud, positive fraud; but, where her general disabilities as a married woman have been removed, she can be estopped by her conduct, though as to the particular matter the law may require a contract or conveyance to be evidenced by certain formalities. In the one case the right to contract by observing the formality is to create a right the woman would not otherwise have had; in the other the requirement of the formality is a restriction on her general power.

In the case of *Monroe v. Stayt*, 51 Wash. 592, 107 Pac. 517, 30 L. R. A. (N. S.) 1102, the facts were that a husband and wife were in possession of land, claiming it as community property. The husband took a written lease from another person who also claimed the property. It was held that the wife was estopped by the lease, and the possession of the husband

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and herself under the lease, from denying the title of the lessor in an action for the possession, although she had refused to sign the lease.

In the following cases the doctrine of estoppel was applied in various ways against married women: *Long v. Crosson*, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783; *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. 870, 4 L. R. A. 333, 16 Am. St. Rep. 683; *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522; *Mohler v. Shank*, 93 Iowa, 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274; *Wilder v. Wilder*, 89 Ala. 414, 7 South. 767, 9 L. R. A. 97, 18 Am. St. Rep. 130; *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; *Government Bldg. & L. Inst. v. Denny*, 154 Ind. 261, 55 N. E. 757; *Lavene v. Jarnecke*, 28 Ind. App. 261, 62 N. E. 510; See *Crowley v. Crowley* (Mo. App.) 151 S. W. 512.

In *Trimble v. State*, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163, it was held that a wife who joins with her husband in making an application to the county auditor for a loan from the school fund, and in the execution of a note therefor, and a mortgage on their land held by the entireties to secure the note, is estopped to deny the validity of the mortgage, although the money obtained was used to pay the individual debts of the husband. It was said that the doctrine of estoppel should be more strictly enforced against a married woman who seeks to defeat a mortgage executed by her to secure the payment of a loan from the school fund obtained under, and in compliance with, the provisions of the school law than in cases where the money has been loaned by private individuals. It will be observed from this case, as well as the railroad cases above referred to, that an estoppel is raised more readily in favor of a public interest.

If the wife intended, during the twelve years the school board had been in possession and making improvements, to bring suit for the possession after the improvements should be completed, she was guilty of actual dishonesty in failing to give

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notice of such intention before the improvements were made. If, as appears more likely from the reading of the record, she intended, until about the time the suit was brought, that the school board should have the property, she will not now be permitted to change her mind.

The judgment should be affirmed.

By the Court: It is so ordered.

KIRBY v. HARDIN.

No. 2895. Opinion Filed July 22, 1913.

Rehearing Denied March 10, 1914.

(134 Pac. 854.)

1. **APPEAL AND ERROR—Subsequent Proceedings—Law of Case.** The decision of the court of last resort, in a case brought to it on appeal, becomes and remains the law of that case through all its subsequent stages and trials.
2. **SAME—Harmless Error—Submission of Issues on Attachment—Conflicting Evidence.** Under the law in force in the Indian Territory prior to statehood, the question of sustaining or dissolving an attachment was for the determination of the court. And where a jury in the case, by direction of the court, sustains an attachment in its verdict, it is no more and no less than the decision of the court on that branch of the case. And where the evidence on that point is conflicting, the decision of the court thereon will not be disturbed.
3. **EVIDENCE—Parol Evidence—Lease.** Where the parties have negotiated concerning the rental of land and have finally entered into a written contract of rental therefor, oral proof of a prior parol contract to repair the fencing is incompetent as tending to vary and contradict the terms of a written instrument.
4. **ATTACHMENT—Sustaining Attachment—Question for Jury—What Law Governs.** Whether, in an action begun in Indian Territory before the admission of the territory to statehood, the sustaining of an attachment was for the court or the jury is to be decided by the law in force before the admission to statehood.

(Syllabus by Brewer, C.)

*Error from District Court, Marshall County;
A. H. Ferguson, Judge.*

Kirby v. Hardin.

Action by J. R. Hardin against R. R. Kirby. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. M. Franklin and Geo. S. March, for plaintiff in error.

F. E. Kennamer, Chas. A. Coakley, Geo. A. Henshaw, and J. W. Falkner, for defendant in error.

Opinion by BREWER, C. This suit to enforce a landlord's lien by attachment of the crops, on statutory grounds, was filed in the commissioner's court in the Southern district of Indian Territory, November 12, 1906. This is the second time that this case has required the consideration of this court. At the first trial in the district court the plaintiff, Hardin, recovered a judgment for \$180 and the attachment was sustained; but, being dissatisfied with the amount of the judgment, the plaintiff appealed the case and it was reversed in an opinion reported in 25 Okla. 479, 106 Pac. 837. At the second trial in the district court, plaintiff recovered a judgment of \$240, and the attachment was sustained, and the defendant is now here asking a reversal of the case.

In the prior record brought to this court it was shown that the defendant, after a general denial, had sought to counterclaim for damages upon two grounds: The first being that the plaintiff had verbally agreed to repair and keep in order the fence on the farm for the protection of defendant's crops; the second ground being that the plaintiff had tortiously torn down the fence surrounding defendant's crops, because of which fact animals had gotten in and destroyed a considerable portion of the same. On this first defense the former opinion of this court held that, inasmuch as the rental contract between the parties was in writing, it was reversible error to admit proof of the parol contract claimed to have been made prior to the written one, and by which it was claimed plaintiff had undertaken to keep the fence in repair. This was the precise point upon which the case was formerly reversed. In that opinion, however, it is clearly pointed out that if the plaintiff had in fact wrongfully and tortiously torn down the fence, thereby causing a partial destruc-

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tion or loss of defendant's crops, the same would be a proper claim for damages without regard to whether or not the rental contract was verbal or in writing. The syllabus to the former opinion is as follows:

"In a suit to enforce a landlord's lien for rent due on a contract in writing containing no provision obligating plaintiff to repair the fence, where defendant pleaded, as a counterclaim for damage a tort, in effect that plaintiff wrongfully tore down said fence and turned stock in upon the crop, testimony in effect that prior to and at the time of the making of said contract it was agreed in parol between the parties that plaintiff would repair the fence sufficient to exclude stock was irrelevant and its admission over objection error."

When the case came on for trial again in the district court after its remand, the defendant filed an amended answer in which the claim for damages, on account of any tortious breaking or tearing down of the fence by plaintiff, is clearly abandoned. This, in our opinion, took out of the case the only issue that the former opinion had not already decided against the defendant on the main branch of the case. The contentions of the defendant, now here as plaintiff in error, for a reversal, when narrowed down to their true meaning, simply go to two points: The first to the effect that the court excluded the evidence offered of a verbal contract by which the plaintiff was to keep the fencing in repair, on the ground that it would tend to contradict and vary the terms of the written rental contract introduced in the evidence and which all parties admitted signing. For admitting this same kind of evidence in the first trial, this cause was reversed; and in excluding it at the second trial, the court was properly following the instructions of this court contained in the former opinion.

The opinion of the highest court on points of law, in a case brought to it by appeal, becomes and remains the law of that case through all its subsequent stages and trials, under the same or substantially the same state of facts. *Metropolitan Ry. Co. v. Fowille*, 36 Okla. 76, 125 Pac. 1125; *A., T. & S. F. Ry. Co. v. Baker*, 37 Okla. 48, 130 Pac. 577; *Oklahoma City G. & P. Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758; *Harding v. Gillett*, 25

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Okla. 199, 107 Pac. 665; *Sovereign Camp W. of W. v. Bridges*, 37 Okla. 430, 132 Pac. 133. Therefore we will not again take up and consider the question of the admissibility of the evidence by which it was sought to show that the plaintiff was under the duty of repairing the fencing through his verbal agreement, and whether or not such proof would fall within the rule prohibiting the contradiction of a written instrument by oral testimony. That point in this case upon the same evidence has been, as we have said before, once decided, and the decision is controlling.

The second point made, and upon which a reversal is demanded, is that it was error for the court to instruct the jury "to find for plaintiff in the sum of \$240 and to sustain the attachment." There was no conflict in the evidence as to the amount due. There was some conflict as to the grounds of attachment. If, under the law in force in Indian Territory, the question of sustaining or dissolving the attachment was a jury question, then it was error to direct the jury to sustain the attachment; but, if this question was one to be determined by the court, then the mere fact that the court so directed the jury was not reversible error. It was but the decision of the court, on the conflicting evidence, that the attachment should be sustained. That the jury incorporated the finding of the court, at its direction, in the verdict was immaterial and quite harmless.

That this question was triable by the court seems to have been the well-settled law in Indian Territory. *Barton v. Ferguson*, 1 Ind. T. 263, 37 S. W. 49; *Sanger v. Flow*, 1 C. C. A. 56, 48 Fed. 152; *Platter Co. v. Low*, 4 C. C. A. 207, 54 Fed. 93; *Holliday v. Cohen*, 34 Ark. 707.

The law so in force controls this case. The court having decided the point upon conflicting evidence, its decision must stand. This results in the affirmance of the case.

By the Court: It is so ordered.

SPENCER v. MINNICK.

No. 3193. Opinion Filed December 20, 1913.

Rehearing Denied March 10, 1914.

(139 Pac. 130.)

1. **LIBEL AND SLANDER—Pleading—Effect of Answer as Admission.** When the answer of defendant in a libel suit admits the publication of the alleged libelous article, at the time and in the manner alleged, and avers in general terms for a defense, that the matters and things published were true, such answer has the effect of not only admitting the words used, but also admits their use with the meaning assigned to them by way of innuendo.
2. **SAME—Defamatory Publication—Right of Recovery.** In a suit based on several alleged libelous articles, when the defense is that the articles published are all true, the plaintiff is entitled to recover, unless the truth of every material item of the defamatory matter is established.
3. **SAME—Libelous Character of Publication—Question of Law.** Where the language of an alleged libel is clear and unambiguous, and the facts are uncontroverted with reference to whether or not the language used is libelous, or its publication privileged, on a trial the questions so presented are of law for the court to determine.
4. **SAME—Liability—Defense.** A man cannot libel another by the publication of language the meaning and damaging effect of which is clear to all men, and where the identity of the person meant cannot be doubted, and then escape liability through the use of a question mark.
5. **SAME—Actionable Words.** Words used in an alleged libelous article are to be taken in their most natural and obvious sense, and in which those to whom they are addressed will be sure to understand them.
6. **SAME.** Language used in a newspaper article, which, given its ordinary, natural, and obvious meaning, exposes the person concerning whom it is used to public hatred, contempt, ridicule, or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, is libelous and actionable.
7. **SAME—Mitigation of Damages—Evidence.** It is competent, in a suit on a libelous article, to show that the publisher had been informed through what he considered reliable sources that the things stated in the article were true, and that he so believed them to be in making the publication; but such evidence can only be considered in mitigation of the libel for the purpose of reducing the damages. It does not tend to prove justification.

(Syllabus by Brewer, C.)

Spencer v. Minnick.

Error from District Court, Payne County;
A. H. Huston, Judge.

Action by Wilbur Spencer against C. A. Minnick for libelous publication. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Eagleton, Biddison & Merritt, for plaintiff in error.

Freeman E. Miller, for defendant in error.

Opinion by BREWER, C. This is a suit for libel based upon the publication in the Yale Record, a newspaper published in Payne county owned and controlled by the defendant in error, of three articles, which the plaintiff in error alleges were false, malicious, and intended to expose him to public hatred, contempt, ridicule, and obloquy, and intended to deprive him of public confidence and to damage him in his business.

The portions of the various articles are set out in the petition in so far as they are claimed, to be libelous; the first, and perhaps the most important of the three, being as follows:

"Having secured reliable information we applied direct to our city marshal to verify the facts, and he plainly informs us that he had been forbidden to interfere with the whisky traffic in Yale, (by whom?)

"By the Board of Trustees of Yale. He had to leave the traffic alone or lose his job. He has been carrying the burden of blame, instead of the real parties. Having learned those facts we thus publicly apologize to Mr. Byrum, for all the hard things we have published concerning him, in so far as this condition of things may relieve him of the responsibility. Mr. Watson informs us that he never concurred in the orders to Byrum and had no knowledge of them, hence the burden rests on the other two members of the old council.

"This also is additional proof of why the old members of the council were so determined to force Watson out of the board, as a man they could not bully into concurring with them in this line of business, hence was not wanted on the board by those worthies.

"Friends and citizens of Yale, what do you think of this situation? Who is the principal man responsible for this lawless condition? Almost every person in Yale believes that Wilbur Spencer is the dominating spirit of the old council. That Brock-

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man is little more than a puppet in his hands. We have in the past published the question! Why was the whisky traffic permitted to flourish in Yale? Who was securing the rake off that must be in circulation under the prevailing conditions? Why were the old members so determined to force Watson out of the board? What was the object sought in removing Watson? We have never been able to secure a reply to any of those questions. Under the light of our present knowledge, the public is free to form their conclusions."

Another article complained of is headed "Church People Attention" and the following language is set out:

"Many of you around Yale are personally familiar with his well known principles of infidelity, possibly some of you have heard him flatly deny the existence of God or any future state of existence. The slush funds of the whisky trust is powerful, therefore every man that has the honor of the district in view or who favors honest, clean men for office, should personally use every reasonable effort to defeat the nomination of Spencer at the primaries."

Another article was headed "Renegade Socialist," which is evidently of less importance than the other two, and which amounted to the charge that the plaintiff had been a Socialist and changed his political affiliations and became a Democrat in the hope of gaining a political position.

After declaring on each of the articles as above stated, the meaning of the several articles, as understood by plaintiff, is set out in form of innuendoes, with prayer for damages, both actual and punitive.

To the petition in the case the defendant answered, first, by way of a general denial of all material matters stated in the petition, except such as are afterwards admitted in the answer. The defendant then admits the publication at the time and in the manner alleged; and he alleges that the things so published were published of the defendant and were true in substance and in fact when published; that they were published for a good purpose and without malice. The defendant further justified by the allegation that the plaintiff was a public officer, and that the statements were criticisms of official acts, and therefore privileged, and that the facts so published were true. The plaintiff

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demurred to the two paragraphs of the answer pleading justification, and, the same being overruled, filed a general denial for a reply. The case was tried to a jury, and a verdict found for the defendant.

The answer pleading the truth of the publication in justification, as may be observed, was general in its character. The pleader could have pleaded the truth of the words as published, and denied the meaning assigned in the innuendo; having, however, declared generally that the matters complained of were in fact true, it had the effect of admitting the words used with the meaning assigned to them in the petition.

In Newell on Slander and Libel (2d Ed.) p. 653, it is said:

"But when a libel is justified generally, the doctrine is well settled that, so far as the justification is concerned, it is justified as applied or explained by the innuendoes, and therefore there can be no justification made out by the evidence unless the facts are proven true as alleged in the declaration and with the meaning there averred, unless with the aid of the colloquium such meaning is repugnant."

—*Atkinson v. Detroit Free Press*, 46 Mich. 347, 9 N. W. 501, and cases cited. There is nothing in the colloquium repugnant to the meaning assigned.

Where the defense is the truth of the libelous publication, unless the truth of every material item of the defamatory matter is established, the plaintiff is entitled to recover damages on those not shown to be true. *Atkinson v. Detroit F. P.*, 46 Mich. 348, 9 N. W. 501.

The court left it to the jury to determine whether the publications admitted to have been made were actionable and constituted libel. This instruction is objected to, and in our judgment constitutes error.

In *Bodine v. Times Journal Pub. Co.*, 26 Okla. 135, 110 Pac. 1096, 31 L. R. A. (N. S.) 147, it is decided:

"Where the language of an alleged libel is clear and unambiguous, and the facts are uncontroverted with reference to whether or not it was libelous or its publication privileged, on a trial the questions so presented are of law for the court, and not of fact for the jury."

And in the course of that opinion the court says:

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"The language used in this article was clear and unambiguous, and the facts in reference to the question of whether it was privileged were uncontradicted, and in such cases it is the duty of the court to determine the construction of the language, and whether it is privileged, as well as whether it is libelous and actionable *per se* (citing many cases)."

And so it is here. The language used in its ordinary meaning, to the mind and understanding of all people, tends to bring the person spoken of into disrepute; to excite public hatred, contempt, and obloquy. The words used in an article claimed to be libelous must be taken in their natural and obvious sense. *Hubbard v. Cowling*, 36 Okla. 603, 129 Pac. 714. Just as certainly would this language, if believed, tend to deprive the person mentioned of the public confidence and esteem, and thus to injure him in whatever business he was engaged. If so, it was libelous under the statute (section 4956, Rev. Laws 1910) and therefore actionable.

A man cannot libel another, by the publication of language, the meaning and damaging effect of which is clear to all men, and where the identity of the person meant cannot be doubted, and then escape liability through the use of a question mark.

Neither do the facts of this case render the contents of the first article set out herein privileged. The publication, in clear and unequivocal effect, charged this town trustee with criminal malfeasance in office. It was intended, partially by insinuation it is true, but just as certainly nevertheless, to convince the people of that community that this plaintiff had prevented the enforcement of the liquor law for a monetary consideration, that there had been a "rake off" in connection with this nonenforcement policy, and that the plaintiff got it. The publication was not privileged, under the facts shown, and the defendant had remaining to him but the defense of "truthful publication without malice" as a complete defense, and then, if this failed, the right to prove any circumstances tending to show good faith, clean purpose, and want of malice, in mitigation of the offense, to reduce the damages.

Inasmuch as this cause must be sent back for retrial, we will say that he have read the evidence, and the same, as presented

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in this record, does not establish the truth of the publication first mentioned herein. On this point there was some evidence, such as given by the witness Byrum and others, relative to information given defendant prior to the publication, which tended to show good faith, that is, that defendant believed the charges true. This would only mitigate. It did not tend to justify. *Wallace v. Koppenbrink*, 31 Okla. 26, 119 Pac. 579. See, also, *Voorhes v. Toncy*, 32 Okla. 570, 122 Pac. 552; *Hubbard v. Cowling*, 36 Okla. 603, 129 Pac. 714.

We think because of the errors mentioned the plaintiff is entitled to a new trial, and to accomplish this the cause must be reversed and remanded, with directions to set the judgment aside and grant a new trial.

By the Court: It is so ordered.

AMERICAN WAREHOUSE CO. *et al.* v. GORDON.

No. 3206. Opinion Filed October 14, 1913.

Rehearing Denied March 10, 1914.

(139 Pac. 123.)

1. **PLEADING—Amendment.** Amendment of pleadings in furtherance of justice may be allowed during the trial, when such amendment does not substantially change the cause of action or defense.
2. **SAME.** In an action for conversion, where the answer is a general denial, and during the course of the trial evidence, tending to show the purchase of the property charged to have been converted and payment, is offered and excluded because not within the issues, and application is then made to the court for permission to amend the answer so as to plead purchase and payment, **held**, that it is error to deny such application to amend.

(Syllabus by Galbraith, C.)

Error from County Court, Ellis County;
A. L. Squire, Judge.

Action by R. C. Gordon against the American Warehouse Company and W. C. Warren. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Opinion of the Court.

C. B. Leedy, J. G. Aubuchon, and Perry J. Morris, for plaintiffs in error.

Opinion by GALBRAITH, C. This was an action commenced in the county court of Ellis county for the recovery of \$177.65, the alleged value of 2,090 pounds of broom corn charged to have been wrongfully converted by the defendants. The petition contained the usual allegations of ownership in the plaintiff, and the wrongful taking and conversion of the property by the defendants, without his knowledge or consent, and the reasonable value of the property. The defendants answered by a general denial. One of the counsel for the defendants, in his statement to the jury, said:

"The defendants in this case answer by a general denial and will offer to show and prove that they have a contract with the plaintiff in this case, R. C. Gordon, to deliver his corn to the defendants at \$105 per ton, and that they advanced one check for \$25 and another check for \$125; that the advanced payments have never been taken out, and that we are entitled to a credit of \$125, and that at the price of corn and the contract the plaintiff in this case will owe us \$15.15. I think that is about the facts in this case."

During the course of the trial, when the court excluded evidence offered relative to the contract of purchase and the advance payments on the ground that payment could not be shown under the general denial, counsel for the defendants then made application to the court for leave to amend their answer so as to allege the defense as outlined in the statement to the jury above set out, and to plead that the defendants entered into a contract with the plaintiff on the 9th day of October, 1909, under the terms of which the plaintiff agreed to sell and did sell to the defendants his entire crop of broom corn for that year, to be delivered at the town of Arnett, at the agreed price of \$105 per ton, and that the 2,090 pounds of corn charged to have been converted by the defendants, as set out in plaintiff's petition, was delivered under this contract, and that the advances had been made on this corn, \$25 at one time and \$100 at another, and that these advances had never been returned or settled for, and that the sum of them exceeded the price of

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the 2,090 pounds of corn in the sum of \$15.15, and that the sum last named was due the defendants from the plaintiff. Objection to the allowance of this amendment was made by counsel for the plaintiff and sustained by the court, and exceptions saved by the defendants.

The defendants assign as one of the grounds for their motion for new trial this ruling of the court denying them permission to amend their answer, and one of the assignments urged on appeal is the overruling of the motion for a new trial. While there are other assignments of error set out in the petition in error, it will be unnecessary to examine them, since the consideration of this assignment will dispose of the appeal.

The rule is well established in this jurisdiction that an application to amend a pleading is addressed to the sound discretion of the trial court, and that the ruling thereon will not be disturbed in this court, unless it appears from the record that the discretion vested in the trial court has been abused. The right to grant or deny the application to amend is vested in the trial court by section 4790 of the Civil Code, which has been many times construed by this court. See *Ball v. Rankin et al.*, 23 Okla. 801, 101 Pac. 1105, where the judgment of the district court was reversed for denying an application to amend the pleading. See, also, *Robinson & Co. v. Stiner*, 26 Okla. 272, 109 Pac. 238, where the judgment of the trial court was reversed for the same reason. See, also, *Alcorn et al. v. Dennis*, 25 Okla. 135, 105 Pac. 1012; *St. L., I. M. & S. Ry. Co. v. Hardwick et al.*, 28 Okla. 577, 115 Pac. 471; *Derr Construction Co. v. Gclruth*, 29 Okla. 538, 120 Pac. 253; *Trower v. Roberts*, 30 Okla. 215, 120 Pac. 617; *Coley v. Johnson*, 32 Okla. 102, 121 Pac. 271.

To be sure, the one limitation placed on the right to amend by the statute is that the proposed amendment shall not substantially change the cause of action or the defense. This limitation is recognized in all of the above cases. The amendment which the defendants asked permission to make in the instant case was within this limitation. The defendants were charged with wrongfully taking the plaintiff's property and converting it to their own use. By their answer they denied this. To show

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that they purchased and paid for the property did not substantially change the defense.

If it were true, as contended by the plaintiffs in error, that they had more than paid for the property that they were charged with converting, it is clear that an injustice was done them by the refusal of the trial court to permit them to amend their answer so as to allege these facts. The statement of counsel for the defendants to the jury indicates that they were laboring under the belief that proof of payment might be shown under the general denial. Assuming, without deciding, that the trial court was right in holding that they were mistaken in this belief, still, under the liberal construction of the statute permitting amendment to pleadings in the interest of justice, the defendants should not have been denied the right to amend their pleadings so as to enable them to make their defense at the trial. It is true that the trial court might have imposed terms, or conditions, upon which he would permit the answer to be amended, as he had a right to do under the statute, but to refuse absolutely the right to amend and thus cut off the right of the defendants to make their defense was an abuse of discretion, vested in the trial court, for which the judgment appealed from should be reversed, and a new trial granted.

By the Court: It is so ordered.

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No. 3221. Opinion Filed January 19, 1914.

Rehearing Denied March 10, 1914.

(139 Pac. 126.)

1. **MASTER AND SERVANT—Trade Unions—Right of Employee to Strike—Liability to Third Persons—Discharge of Non-Union Employee.** Employees of a coal company, who are members of a labor union, have the right, when involved in a trade dispute between themselves and their employer, and growing out of this relation, to protest to their employer against the employment, or retention in his employment, of a non-union employee, and to

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accompany such protest with the statement that if such non-union man is employed, or retained, the union employees will strike—that is, that such employees will simultaneously cease to work for such employer—and if such protest is not heeded, the union men have the lawful right to strike; and if it is heeded, the non-union man who is discharged has no cause of action against either the union as an organization, or the members thereof as individuals.

2. **SAME.** A petition, based on the charge that the plaintiff, a non-member of a labor union, was discharged from his employment because of the demands therefor made by the authorized agents and committees of a labor organization, who informed the common employer that if such non-union man was not discharged the union men would strike, does not state a cause of action for damages against either the labor organization or the individual members thereof; and a demurrer to such petition was properly sustained.
3. **SAME—Right to Quit Employment—Strikes.** Any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason. If his wages are not satisfactory, his hours too long, his work too hard, his employer or his employment uncongenial, or his collaborators objectionable, his right to quit is absolute. What an individual may do, a number of his co-laborers may join him in doing, provided the thing to be done is lawful.

(Syllabus by Brewer, C.)

Error from District Court, Coal County;
Robt. M. Rainey, Judge.

Action by J. H. Roddy against the United Mine Workers of America and others. Judgment for defendants and plaintiff brings error. Affirmed.

C. T. Gibson, for plaintiff in error.

W. N. Redwine and *C. M. Thrcadgill*, for defendants in error.

Opinion by BREWER, C. The court sustained a demurrer to the petition, which is lengthy, but which we think is fairly summarized as follows:

The plaintiff alleges:

That the defendant United Mine Workers of America is a voluntary association composed of men engaged in coal mining, in the United States, Mexico, and Canada. That defendant United Mine Workers of America, District No. 21, is a part and

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subdivision of the United Mine Workers of America. That defendant Local Union No. 1811 is also a local subdivision of the association. That the 500 or 600 individuals sued are members of the general and district organizations, through their membership in the said local union. That all of the defendants are bound together in one organized body "for the purpose and with the object of uniting all employees who produce or handle coal or coke in or around mines, into one body, and to ameliorate their conditions by conciliation, arbitration or strike."

That the local union secures members for the organization; transacts business of a local nature relating to the organization and its departments; elects local officers and representatives to the national organization; elects or appoints agents, representatives, and committees; and vests them with power and authority to represent the local union in its dealings with the mine operators, etc.

That all the individual defendants were members of the union and were in the employ of the Western Coal & Mining Company, and that as such members of such organization defendants declared who should be employed by such coal company. That there was a parol agreement between the coal company and the defendants in their organized capacity that no one objectionable to organized labor would be employed in its coal mines.

That on the 1st of May, 1909, and for a long time prior thereto, plaintiff had been in the employ of the coal company as an entryman, and was receiving \$125 per month for his work. That his relations with the coal company were amicable, and its agents had informed him that he would be retained in its employment so long as his work was satisfactory.

(3) That the defendants conspired "willfully, knowingly, maliciously, and unlawfully" to procure plaintiff's discharge, to destroy his reputation and credit, and to harass and annoy him, to prevent his securing employment, and to publish him as a non-union man, etc.

(4) The fourth paragraph is lengthy, and complains of the union "blacklisting the defendant on the books of the union"

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as a nonunion man, etc. (It is not clear what this paragraph intends to charge, unless it be relative to some trial or expulsion of plaintiff from the union; at any rate the language is so indefinite that it is unimportant in this summary.)

The petition then sets out the specific things the defendants are charged with doing at great length, and we think with much superfluity of words, and which, summarized, alleges:

That about May 1, 1909, a committee of the local union (naming the individuals) called on the mine foreman, William Veatch, and informed him "that the plaintiff, J. H. Roddy, was a nonunion man and a man objectionable to the United Mine Workers of America and the membership thereof, defendants herein, had been so recorded on the books of the defendants herein; that he, the said J. H. Roddy, plaintiff, was a man unfit to work with union men, and that they, etc., demanded * * * that said William Veatch * * * discharge the plaintiff," etc.

It is then charged that this committee made the same statements and demands of John S. Cameron, the mine superintendent. It is then charged that James Mullen, a representative of the United Mine Workers of America, and Mose Clevenger, a representative of district No. 21, of the organization, appeared before John S. Cameron, superintendent, and made the same statements and demands made by the local committee as above stated, with the additional statement that if plaintiff was retained in the employ of the company the defendants would strike and quit their employment with it.

The petition then charges that plaintiff was discharged by the coal company on account of the actions of the defendants, saying that they would strike, and because of the agreement between the company and the union that no nonunion man would be retained in its employment, and that he would not have been discharged but for the actions of the defendants as alleged.

The petition then proceeds with several pages of matter dealing with the results to him of his discharge from his employment, and the recordation of the fact that he was a nonunion man, and the various ways in which he has suffered and been injured thereby, and of the various elements entering into his

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claim of an aggregate of \$100,000 damages from the defendants, but we think the gravamen of the charge claimed to be actionable has been made to fully appear in the above synopsis of the petition.

When the petition in this case is studied and analyzed, it clearly appears that the thing complained of—the acts forming the sole basis upon which the suit is founded, and for which relief in the way of damages is sought—is that these union men protested to their employer, the coal company, against plaintiff's retention as a workman at the mine, and followed this with the statement that if he was so retained the union men would quit work; the reason given being that plaintiff was a nonunion man. If this action was lawful, it follows that damages cannot be predicated upon it. So our inquiry is ended when we determine whether the defendants, in what they did, were within their legal rights.

Since many individual laborers, in the various trades, have brought themselves together into large and well-organized bodies, with the power, necessarily, and we think rightly, of affecting wages, hours of employment, and other physical as well as moral conditions in all the wide fields of industry, the rights and duties of such organizations and the members thereof, with regard to their employers, as well as to society as a whole, has been a fruitful field of litigation, and practically every court in this country has had occasion to consider some of the many phases of the question. This has brought about much conflict of opinion, but, as we view it, our duty is best performed by confining our remarks here closely to the sole question involved; for, as we perceive it, while the tangled web of judicial opinion affords opportunity for a delightful excursion far afield, yet, one who essays to ramble there must be a very wise man if he does not say concerning it either too much or too little.

We take it as fundamental that any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason. If his wages are not satisfactory, his hours too long, his work too hard, his employer or employment uncongenial, or

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his colaborers objectionable, his right to quit is absolute. We think, under the better authority, that what an individual may do, a number of his colaborers may join him in doing, provided the thing to be done is lawful. We quote the words of Chief Justice Alton B. Parker, in *Nat'l Protective Ass'n v. Cumming*, 170 N. Y. 320, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648:

"It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike, that is, to cease working in a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law."

The opinion proceeds with a lengthy and interesting discussion of the law, from which the court deduces the following syllabus:

"A labor union may refuse to permit its members to work with fellow servants who are members of a rival organization, may notify the employer to that effect, and that a strike will be ordered unless such servants are discharged, where its action is based upon a proper motive, such as a purpose to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to its members on their own terms and conditions, provided that no force is employed and no unlawful act is committed. If, under such circumstances, the employees objected to are discharged neither they nor the organization of which they are members have a right of action against the union or its members."

In *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367, it is said:

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"So far as appears by these instructions none of the appellants were under any continuing contract to labor for their employer. Each one could have quit without incurring any civil liability to him. What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence, or attempt at intimidation."

And in *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, it is said:

"One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employee for damages, whatever may have been his motive in procuring the discharge."

In Cook's Trade & Labor Combinations the question of the right to strike is discussed by the author at page 31, section 8, as follows:

"The right of a single individual, apart from contractual relations, to quit his employment, that is to discontinue working for a particular employer, seems never to have been seriously questioned. The idea has been advanced that the nature of the employment may create an implied agreement not to quit, at least, without reasonable notice, but this exception to the general doctrine remains to become generally established. It has been seriously questioned whether this right to quit one's employment equally exists in a case of a combination to so quit employment or discontinue working. In other words, the question is whether strikes are legal, for we define a strike as a simultaneous quitting of employment by a number of employees in pursuance of agreement. Apart from the lurking idea, already considered, that an act entirely lawful if done by a single individual may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act it is difficult, on principle, to discover any illegality in a strike, as we have just defined it. and this is the view that has been generally adopted in this country."

And the author, after discussing the doctrine of the English courts relative to combinations among workmen, and after eliminating the question of physical violence and unlawful methods which sometimes accompany strikes, sums up by saying on page 36:

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"Applying, however, what has already been said, we may say here that (apart from the existence of contractual liability) the existence of the relation of employee justifies, as a natural incident or outgrowth of such relation, the quitting of employment, whether singly or in a combination, and whether or not with the intent to injure the employer (or any other person)."

Parkinson v. Building Trade Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722; 24 Cyc. 821 and note 41 of authorities; *Meier v. Speer*, 96 Ark. 618, 132 S. W. 988, 32 L. R. A. (N. S.) 792; *Pierce v. Union*, 156 Cal. 70, 103 Pac. 324.

The case of *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, considers when a strike will be illegal, and an extended discussion of the question will be found both in the opinion and in the note collecting the authorities.

A petition based on the charge that the plaintiff, a non-member of a labor union, was discharged from his employment because of the demands therefor made by the authorized agents and committees of a labor organization, who informed the common employer that if such nonunion man was not discharged, the union men would strike, does not state a cause of action for damages against either the labor organization or the individual members thereof, and a demurrer to such petition was properly sustained.

The cause should be affirmed.

By the Court: It is so ordered.

In re Cross (Butler).

In re CROSS (BUTLER).
POPHAM v. CROSS.

No. 3234. Opinion Filed December 20, 1913.

Rehearing Denied March 10, 1914.

(137 Pac. 673.)

1. **HABEAS CORPUS—Custody of Child—Right of Mother.** The legal right of the mother of a minor child, its father being dead, to its custody and control, is superior to that of a third person, whose claim is based upon the fact that he has cared for and supported the child for some two or three years.
2. **SAME.** The husband, whose wife undertook the care of an infant child for an uncertain compensation, and who cared for and supported it for two or three years, has no legal right to the custody of such child against the claim of its mother, and the mother, having obtained its custody, cannot be deprived thereof by writ of **habeas corpus**.

(Syllabus by Galbraith, C.)

Error from County Court, Kingfisher County;
John M. Graham, Judge.

Application of F. F. Cross for a writ of *habeas corpus* against Viola Popham, to recover the custody of A. M. Cross (Butler). Order granting the writ, and defendant brings error. Reversed and remanded, with directions.

Cunningham & Weiss and *Willis & Willis*, for plaintiff in error.

Opinion by GALBRAITH, C. This action was commenced in the county court of Kingfisher county by F. F. Cross filing a petition for writ of *habeas corpus*, setting out that Admiral Mason Cross (Butler), a minor four years old past, was unlawfully restrained of his liberty in Kingfisher county by Viola Popham, and that he was entitled to the care, custody, and control of said minor, and praying that the court so adjudge. The writ was issued, and the return made thereto by Viola Popham denied that said minor was unlawfully restrained of his liberty, and alleged that the minor was the son of the respondent and

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William Butler, and that his name was not Cross, but that his true name is and was Admiral Mason Butler; that the father of said minor was dead, and that she was entitled to his care, custody, and control, and that she was able and willing to educate and care for him, and that Cross had no right, either in law or equity, to the custody or control of said child. A hearing was had, and the custody of the child was awarded to Cross. The mother appeals to this court from that order.

It appears from the testimony taken at the hearing that William Butler, the father of the child, died a few months before it was born; that its mother, Viola Butler, now Popham, plaintiff in error in this action, was without property, and was compelled to work for a living; that when the child was some four months old she obtained work in a hotel and attempted to care for it, but after several months' effort along that line found that she was unable to perform her work and care for the child, and upon the advice of her physician she arranged with Mrs. Cross, the wife of the petitioner, to care for him. Her testimony as to the arrangement with Mrs. Cross is undisputed, and is as follows:

"Q. Now, Mrs. Popham, why was it, what induced you at the time you made this arrangement with Mrs. Cross with reference to taking care of the baby? A. Dr. Caylor, and also his wife and several other ladies there that visited during the sickness, advised me to let some good lady take the baby and take care of it, and I let Mrs. Cross take the baby to take care of for me, and I paid her. Q. Why did they advise you to do that? A. They said I couldn't work and take care of the baby and give it the proper attention. Q. What was the agreement you made with Mrs. Cross? A. I took the baby down there for her to take care of for me, and she was to take care of the baby for me and I was to pay her whatever I was able. I was to clothe the baby and give her what I was able. Q. Did you make any agreement with Mr. Cross with reference to taking care of the baby? A. No, sir. Q. Or with reference to taking the baby and placing it in the care of his mother? A. No, sir; I did not. Q. After that time, did you work, and, if so, where did you work? A. After I took the baby down to Mrs. Cross I went out on a ranch and worked eight months. Q. What kind of work were you doing? A. Helping cook and take care of the house, general house

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work. Q. How far from town? A. Twenty miles. Q. On a ranch? A. Yes, sir. Q. Did you pay Mrs. Cross at any time out of the wages you had? A. Yes, sir. Q. What amounts did you pay her? A. I paid her \$20 at one time and \$12 and \$10 and \$5. Q. Did you send it to her? A. I would send the money to her. There was one time I paid her \$20 I gave it to her. She came to Canadian, and I went to town and gave it to her. Q. Now, Mrs. Popham, did you ever agree, or ever give your child to Mrs. Cross or Mr. Cross? A. No, sir; I didn't give my baby away to them. Q. Did you ever have any other agreement with Mrs. Cross in reference to your child; the only one was that with reference to paying the money? A. No, sir; I never made any other."

This testimony shows that Mrs. Cross, the wife of the defendant in error, undertook the care of the child for hire—an uncertain and indefinite amount that its mother could spare from her wages—and clearly refutes the idea of abandonment, or any intention on the part of the mother to relinquish or abandon her natural right to the care and custody of her child. It also appears from the record that after Mrs. Cross had cared for the child some two years she became afflicted with some mental disorder that rendered her incapable of caring for herself, much less the child, and that Mr. Cross then removed from Ellis to Kingfisher county, taking the child with him, and placed him in the care of his (Cross's) mother, with whom he also lived; that near the time Cross moved to Kingfisher county, Mrs. Butler, the mother of the child, married a man by the name of Popham, at Cannon City, Tex., and that he is a man of considerable means, and is willing and anxious that the mother of the child shall take it to their home, that he may support, maintain, and educate it; that Cross refused to give up the child; that the day this action was commenced Mrs. Popham, the mother, by consent of Cross, took the child for a drive, and that Cross, fearing that she intended to take it to her home in Texas, sued out the writ of *habeas corpus*.

It was said by Commissioner Robertson, in rendering the opinion of the court, in *Zink v. Milner et al.*, 39 Okla. 347, 135 Pac. 1:

"The question of the custody of an infant child is one always fraught with danger and grave responsibilities. As a general

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rule, this court will be slow to interfere with the judgment of a trial court in a case in which this delicate question is involved. The reasons for this hesitancy on the part of the appellate courts are obvious, and it is unnecessary to enter into a discussion of them at this time. Suffice it to say, however, that when from the record before us it is clearly apparent that an injustice has been done in a given case, this court, in the exercise of its corrective and superintending power, will not hesitate to enter upon an examination of the record, or to correct any error that for any reason may have been committed by the trial court."

There is no doubt that Cross, having the care and custody of this child for a number of years, had become attached to him, and had a fatherly affection for him, and there is no complaint as to the care and attention he gave him; still his claim to the care and custody of the child cannot be successfully maintained against the claim of the mother. It appears from the record that the mother was better able to care for, maintain, and support the child at the time of the trial than Cross, and that she was a proper person to be intrusted with its care.

The trial court gave no reason for awarding the custody of the child to Cross and denying the claim of the mother thereto. The record does not show any justification for making the order appealed from. The mother has the right to the care, custody, and control of her boy, now that she is properly able to care for him, and no reason appears from the record why this right should be denied her. *State of Louisiana ex rel. Delia Kearney v. Steel*, 121 La. 215, 46 South. 215, 16 L. R. A. (N. S.) 1004.

For these reasons the order appealed from should be vacated, and said cause remanded to the county court of Kingfisher county, with directions to enter an order awarding the custody of the minor, Admiral Mason Butler, to his mother, Viola Popham, and taxing the costs of the proceeding against the defendant in error.

By the Court: It is so ordered.

DUNCAN COTTON OIL CO. v. COX.

No. 3270. Opinion Filed January 19, 1914.

Rehearing Denied March 10, 1914.

(139 Pac. 270.)

1. **MASTER AND SERVANT—Death of Servant—Petition—Sufficiency.** In an action for death by wrongful act prosecuted by an administrator for the benefit of the surviving widow and next of kin, where the answer is a general denial and a plea of contributory negligence and assumption of risk, and the petition charges certain specific acts of negligence on the part of the defendant, as the proximate cause of the action resulting in the death of the deceased, it is not error to overrule a general demurrer to the petition, even though it may contain statements from which the negligence of the deceased might be inferred.
2. **TRIAL—Direction of Verdict—Evidence.** A motion by the defendant for a directed verdict at the close of the plaintiff's evidence presents to the trial court the question whether, admitting the truth of the evidence which has been given in favor of the plaintiff, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith. Where the evidence is conflicting, and the court is asked to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving for consideration that evidence which is favorable to the party against whom the motion is leveled. If, upon such consideration, there appears to be sufficient evidence to support a verdict for the plaintiff, it is not error to overrule the motion to direct a verdict for the defendant.
3. **TRIAL—Exception to Instruction—Sufficiency.** An exception to a written instruction taken in the following form: "The defendant excepts generally and specially to each and every instruction to the jury"—is too general and not a sufficient exception under section 5003, Rev. Laws 1910, to bring before this court for review any particular instruction.

(Syllabus by Galbraith, C.)

*Error from District Court, Stephens County;**Frank M. Bailey, Judge.*

Action by Horace J. Cox, administrator, against the Duncan Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Duncan Cotton Oil Co. v. Cox.

Gilbert & Bond, for plaintiff in error.

T. B. Reeder and Cruce, Cruce & Cruce, for defendant in error.

Opinion by GALBRAITH, C. Horace J. Cox, as administrator of Thos. C. Cox, commenced this action in the district court of Stephens county, Okla., against the Duncan Cotton Oil Company, to recover damages for the death of Thos. C. Cox, for the benefit of the surviving widow and next of kin.

The petition charged, in brief, that the defendant was engaged in operating a cotton seed oil mill at the city of Duncan, and employed one Thos. C. Cox as helper to one Jacobis, a skilled machinist in defendant's employ; that Cox was a green, country boy, inexperienced in the use of machinery, and unacquainted with the dangers incident to the operation of machinery in a cotton seed oil mill; that Cox's work had been as a helper to Jacobis in the repair of certain machinery in the mill, and he had been so employed some three months prior to his death; that the superintendent of the mill directed Jacobis to take his helper and to go and adjust and start to running the hull conveyer; that, after the hull conveyer had been adjusted and placed in condition to start running, Jacobis and Cox started up to the main shaft, located near the roof of the building, the hull conveyer being operated by means of a pulley attached to and extending out from the box in which the conveyer was located, and a six-inch belt extending from this pulley to the main shaft near the roof of the building; that Cox was in the lead, and Jacobis said to him, "Tom, you had better let me put that belt on;" and Cox replied, "I will do it;" that Jacobis remained down by the hull conveyer, put the belt on the pulley attached thereto, and Cox proceeded up a ladder to the main shaft and put the belt on the pulley thereon; that this was dangerous work and Cox was unacquainted with the dangers incident thereto; that he was not warned or cautioned in regard to such dangers; that in the discharge of such duty, and without fault on his part, the belt slipped off the pulley on the main shaft and was pulled off the pulley attached to the hull conveyer, and the main shaft,

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making many revolutions per minute, carried this belt around and wrapped around Cox's legs and feet, and he was carried around the main shaft and bound thereto, and thereby lost his life. It was also alleged that Cox was a young man, in good health, 25 years old, of good habits, and earning \$1.50 per day at the time of his death, and was survived by a widow and next of kin, naming them.

The defendant interposed a general demurrer to the petition, which was overruled, and exceptions saved, and then answered by general denial, pleading contributory negligence, and assumption of risk. After the testimony of the plaintiff had been introduced, the defendant moved for an instructed verdict. This motion being overruled, the defendant refused to offer any testimony, and the jury were instructed as to the law, the cause argued and submitted, and a verdict returned for the plaintiff in the sum of \$4,000. The exceptions saved at the trial were set out in a motion for new trial, which was overruled, and exceptions taken, and appeal perfected to this court.

First. It is insisted that the court erred in overruling the demurrer to the petition, inasmuch as it is claimed that it appeared from the allegations therein that the deceased was guilty of contributory negligence. Even if this were true, we cannot hold that the court was in error in its ruling on the demurrer, since the petition clearly charged negligence on the part of the defendant, and, under the Constitution and law of this state, the questions of the assumption of risk and contributory negligence are questions that must be submitted to the jury for determination, and the trial court properly so held in this case.

Second. It is again urged that the court should have instructed the jury to return a verdict for the defendant.

It appears from the evidence: That the deceased, Thos. C. Cox, was a man some 25 years of age, and was, by occupation, a farmer. That some three or four months prior to his death he was employed by the defendant company as a helper to D. W. Jacobis, an experienced machinist, and he worked about the mill putting in steam, water pipes, and hydraulic pipings. That the superintendent of the defendant company, at that time, was one

F. A. Stone. That on the morning of the day of the accident the superintendent directed Jacobis to take his helper, the deceased, and put the hull conveyer in shape and start it to running. That the mill was operated by power furnished by an engine, and the power was distributed to the different portions of the mill by means of shafts and pulleys. The main shaft was 80 or 90 feet long and extended up near the roof of the building in which the mill was located, and on this main shaft, at different intervals where necessary, were constructed pulleys on which were placed belts extending to different parts of the building where the power was applied to various machinery. That the hull conveyer was operated by means of a belt placed on the main shaft near the roof of the building extending down to a pulley extending out from the box in which the hull conveyer was operated and attached to the conveyer, and that this pulley was six inches in length for a six-inch belt. That there were two pulleys on the main shaft in the top of the building some five inches apart, on one of which the six-inch belt that operated the hull conveyer was placed. That the running board placed along the main shaft on which the employee was expected to stand when placing the belt on the pulley was built about even with the box in which the main shaft was operated, and within four or five feet of the roof of the building. That, when Jacobis and his helper had adjusted the seed conveyer and placed it in alignment and ready to start it running, he and Cox started toward the main shaft, and Cox was in the lead, when Jacobis said to him, "Tom, you had better let me put that belt on;" and Cox replied, "No, I'll do it;" and proceeded up to the main shaft, and sat down on the running board and allowed his feet to hang down in the direction that the belt extended going to the seed conveyer. That, when the belt was put on the pulley of the main shaft, it slipped off and ran between that and another pulley on the shaft, and, the space between the pulleys not being as wide as the belt, the belt was crumpled, which caused it to pull off the pulley attached to the hull conveyer, and the main shaft, revolving very rapidly, carried the belt around it, and in

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swinging around the main shaft this belt caught Cox's feet and wound him around the main shaft, causing his death.

The testimony shows that the construction of the running board along this main shaft was such that a person, attempting to put a belt on as the deceased attempted to do, was compelled to either sit down on the running board and allow his feet to hang down below, or to stand up with his feet on the running board, and bend over working with his hands on a level with his feet, and in this last attitude the worker was in imminent danger of losing his balance and falling off, and that really the safer course was followed by Cox in sitting down on the running board; that the space between the pulleys on the main shaft, being less than six inches, was a faulty construction, since, if the space between the two pulleys on the main shaft had been as wide or wider than the belt when it slipped off the pulley to the shaft, it would not have crumpled and would not have pulled off the pulley attached to the conveyer, and the accident would not have happened.

The negligence charged in the petition was in the faulty construction of this running board; that it was built too near the roof and put on a level with the main shaft, while it should have been constructed three or four feet below the main shaft, so that the employee could have stood with his feet on the running board and put the belt on the pulley without danger of falling. And, again, in the faulty construction of the two pulleys on the main shaft in placing them at a less distance apart than the width of the belt intended to run thereon. And, again, in sending the deceased to perform a dangerous task, knowing that he was unacquainted with the dangers incident to the performance of the act he was directed to perform, without caution or warning of any kind. The evidence tends to support each of these charges of negligence on the part of the defendant, and was ample to take them to the jury. The testimony properly raised the question as to whether or not the master had used reasonable care in providing a safe place for the employee to work, and there was no pretense that the employee had been warned of the dangers incident to the work that he was directed to do. The rule

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on this question is well stated by Mr. Justice Turner, speaking for the court in the case of *Schoner v. Allen*, 25 Okla. 22, at 25, 105 Pac. 191, at 192, where it is said:

"It is well settled that where the master knows the employment is dangerous, and also knows that the servant is ignorant and inexperienced in the employment, and has no knowledge of the dangers incident thereto, it is the duty of the master to warn the servant of the danger and instruct him to avoid it. If the failure to perform such duty resulted in injury to the servant, the master is liable. Even where the danger is patent and open to observation, it is the duty of the master to warn and instruct the servant in regard to it, if through inexperience, or from any cause whatever, the servant is unable to understand fully and appreciate the nature and extent of said danger."

The rule in this jurisdiction on a motion for a directed verdict, as announced by the Supreme Court in *Solts v. Southwestern Cotton Oil Co.*, 28 Okla. 706, 115 Pac. 776, is as follows:

"The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith. Where the evidence is conflicting, and the court is asked to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration and totally disregarded, leaving for consideration that evidence which is favorable to the party against whom the motion is leveled."

Applying this rule to the facts established by the plaintiff's evidence, we are inclined to the opinion that the evidence submitted clearly tended to sustain each of the acts of negligence charged in the petition against the defendant, and that it was no error for the court to deny the motion for a directed verdict for the defendant.

A large part of the brief of the plaintiff in error is taken up in discussing certain instructions of the trial court to the jury. The exception to the instructions of the court reads as follows:

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"Thereupon the court read his instructions to the jury. Mr. Gilbert: The defendant excepts generally and specially to each and every paragraph of the court's instruction to the jury. Mr. Gilbert: We except to the action of the court in refusing to give two instructions requested by the defendant."

This exception was not sufficient to bring before this court for review the instructions complained of. The instructions were in writing, and, if counsel wished to except to any one of them, it was his duty to except to that particular instruction, and thus call the attention of the trial court to it in order that the trial court might consider his objection and correct the error, if any, or at least be given an opportunity to do so. The proceeding for saving exceptions to instructions is plainly prescribed by section 5003, Rev. Laws 1910. See, also, *Eisminger v. Beman*, 32 Okla. 818, 124 Pac. 289, for a discussion of the application of this statute. The instructions of the court to the jury fairly stated the law of the case under the issues involved in the cause, and, since no proper exceptions were saved to any particular instruction, we decline to consider any of those discussed in the brief.

It is also complained that the court erred in admitting and excluding certain testimony. We have carefully examined these exceptions and are clearly convinced that they are without merit.

Upon a consideration of the whole record, we find that the judgment appealed from should be affirmed.

By the Court: It is so ordered.

LAMB v. DODSON.

No. 3285. Opinion Filed November 25, 1913.

Rehearing Denied March 10, 1914.

(139 Pac. 125.)

FRAUD—Damages—Petition—Sufficiency. The petition states a cause of action.

(Syllabus by Brewer, C.)

Error from District Court, Kingfisher County;
James B. Cullison, Judge.

Lamb v. Dodson.

Action by Survannah M. Dodson against Charles F. Lamb. Judgment for plaintiff, and defendant brings error. Affirmed.

W. L. Moore, for plaintiff in error.

P. S. Nagle, for defendant in error.

Opinion by BREWER, C. The defendant in error sued the plaintiff in error for damages for fraud in connection with a trade made between them in which she conveyed her homestead, a quarter section of land in Kingfisher county, Okla., for a section of land in Lipscomb county, Tex. The jury awarded her \$7,000 as her damages. The land she conveyed had passed into the hands of innocent purchasers, and was lost to her. The record contains more than 200 pages of matter, the petition and exhibits comprising ten pages. The petition in error sets up 25 specific assignments of error. The brief filed by plaintiff in error, however, only raises the single point that the petition does not state a cause of action. The brief does not set out the petition attacked, nor does it give an abstract of same, except in the most meager way. The brief attacks only one phase of the petition; the same being the sufficiency of the allegations of the offer to restore what she had received. To sustain this point the brief copies the following paragraph of the petition:

"Your petitioner further alleges and states the fact to be that when she discovered that she had been defrauded and swindled, she made, executed, and offered to deliver to the said James M. Brandt, her quitclaim deed to the Texas land conveyed to her by said James M. Brandt, and offered, and now offers, to reconvey to the said James M. Brandt the said Texas land, and that said plaintiff offers to place the said James M. Brandt and said Charles F. Lamb in the same position that they held prior to the said conveyance, and to do all things necessary for her to do before this suit could be brought."

The brief then makes the observation that:

"It is nowhere alleged that the quitclaim deed tendered would have reconveyed * * * the title parted with," etc.

This is followed by less than a page of statement and argument, without the citation of a single authority. We have found the petition in the case-made, and have examined same and have

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not the slightest doubt but that, as against a general demurrer, it states a cause of action.

We do not consider it necessary to go into a detailed analysis of the pleading, as we feel justified in treating the matter as summarily as has the appellant.

The judgment should be affirmed.

By the Court: It is so ordered.

WADE v. RAY.

No. 3290. Opinion Filed December 20, 1913.

Rehearing Denied March 10, 1914.

(139 Pac. 116.)

1. **APPEAL AND ERROR—Review—Conflicting Evidence.** Where the evidence is conflicting, but fairly supports the verdict returned by the jury, such verdict will not be disturbed on appeal.
2. **SALES—Action on Note—Instructions as to Set-Off.** Instructions examined, and held to fairly present the issues in the case, and to correctly declare the law applicable thereto.

(Syllabus by Brewer, C.)

*Error from County Court, Oklahoma County;
Sam Hooker, Judge.*

Action by T. H. Ray against M. E. Wade. Judgment for plaintiff, and defendant brings error. Affirmed.

Munden & Horton, for plaintiff in error.

Grant Stanley, for defendant in error.

Opinion by BREWER, C. This suit is on a note for \$176. The plaintiff below, Ray, was awarded judgment for the sum claimed on the verdict of a jury. The defendant below, Wade, appeals.

The note was in the form frequently used by venders of farming implements and machinery, and contained a clause reserving title in the vendor, and providing that, under certain con-

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ditions named, the vendor could retake the chattels sold, and sell the same and apply the proceeds as a credit on the note. The blank for a description of the chattels was not filled in. The defendant admitted the execution and delivery of the note, and set up as a defense that the note was given for certain articles of machinery, and that under the terms of the note the plaintiff demanded a return of the articles or implements, and that defendant returned to plaintiff "*all, or practically all, of said tools.*" This was not a complete defense to the note. It probably falls under that class of averments denominated as a "negative pregnant," and if it can be considered as tendering an issue, it was no more than an admission of some liability, with an averment of a right to credits, the amount of which was not definitely known. The court appears to have so treated it.

The burden of proof was assumed properly by defendant, and his evidence tended to prove that on the date of the execution of the note in suit, he returned a number of implements to plaintiff; that plaintiff was to sell them later and credit the proceeds on the note. Plaintiff's evidence was positive to the effect that at the date of the execution of the note in suit, defendant owed him several smaller notes and accrued interest, and an open account for hardware repairing, etc.; that defendant had been owing him on these various items a long time, and had paid him nothing; that defendant returned the implements he claimed to have returned; that they were of small value, because of use and exposure to the weather; that a complete settlement was had between the parties; that he gave defendant credit for his own valuation of the returned tools, deducted this sum from his entire indebtedness, returning to defendant his old notes, and charging off his account, and that defendant executed the note in suit to cover the balance thus found to be still unpaid; that defendant was justly indebted in the full amount of the note in suit.

The only issue that it can be contended was in the case was fairly, clearly, and accurately presented to the jury in the following instructions:

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"(3) If you believe from the evidence that there was this agreement as claimed by the defendant between the defendant and plaintiff in reference to this property which was returned, that is, that the plaintiff was to sell the property and credit the same upon the note, the defendant then would be entitled to a credit to the extent of the reasonable value of the property in question at the time the same was delivered to the plaintiff in the condition it was in at that time. That you are to determine from the evidence in this case."

"(7) If you believe at the time of the execution of this note in controversy, sued on in this case, that the parties had a complete settlement between themselves as to all matters that existed between them, and that this note was executed for the payment of the amount then agreed that was due to the plaintiff in this case, your verdict in that event should be for the plaintiff upon the note sued upon, and for the amount sued for by the plaintiff."

The evidence was conflicting; in our judgment that of plaintiff greatly preponderated in probative value. The jury found for plaintiff for the amount of the note. Affirmed.

By the Court: It is so ordered.

SMITH ROLFE CO. v. WALLACE.

No. 3307. Opinion Filed January 19, 1914.

Rehearing Denied March 10, 1914.

(139 Pac. 248.)

CORPORATIONS—Contracts of Foreign Corporations—Validity—License

Tax. A foreign corporation doing business in this state has complied with all the requirements of the Constitution (sections 43, 44, art. 9) and of the statutes (sections 1538-1540, Comp. Laws 1909) by filing a copy of its charter or articles of incorporation, and designating an agent for the service of process as required, a failure to do which would render its contracts void, and close the courts to it in enforcing them (section 1541, Comp. Laws 1909; Rev. Laws 1910, sec. 1338); but it has failed to comply with, and pay the license tax required by, chapter 57, Session Laws 1910 (sections 7538 to 7549, Rev. Laws 1910). **Held**, that the contracts of such corporation, while in such default as to the payment of the license tax, are not void, nor is its right to enforce them in the courts of this state to be denied.

(Syllabus by Brewer, C.)

Smith Rolfe Co. v. Wallace.

*Error from County Court, Oklahoma County;
John W. Hayson, Judge.*

Action by the Smith Rolfe Company, a corporation, against R. G. Wallace. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Wilson & Tomerlin and *E. E. Buckholts*, for plaintiff in error.

Scothorn, Caldwell & McRill, for defendant in error.

Opinion by BREWER, C. The defendant in error, Wallace, was sued for a balance of \$200 due by him on an automobile. His defense was that the plaintiff, a foreign corporation, had a place of business in this state, and part of its capital in use here, and had failed to pay its license tax, and make its report as required by chapter 57 of the Session Laws of 1910. The court overruled a demurrer to this defense, and gave judgment on the pleadings for defendant. The question to be decided here is whether the answer set up a defense.

When we consider what the answer says, and what it omits to say, we have this state of facts: The plaintiff, a foreign corporation, has a place of business, and is doing business, in Oklahoma. It has filed copies of its articles of incorporation with the Secretary of State, and has appointed its agent for the service of process, and performed all the things required to be performed by sections 1538-1540, Comp. Laws 1909. It has failed to make its report to the Corporation Commission and pay its license tax as required by the act of 1910 (chapter 57, Sess. Laws 1910 [sections 7538 to 7549, Rev. Laws 1910]).

The contention of defendant is that the failure of plaintiff to comply with the requirements of the act of 1910 renders its contracts void, and deprives it of the right to enforce them in any court of this state. It is not claimed that any such penalty is provided in the act itself, but that this result flows from the provision of the act providing that a license must be obtained by such corporation, before it can do any business in the state. We do not think this contention sound, under the previous hold-

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ings of this court. It will be borne in mind, so that no confusion may arise, that a failure to comply with section 1540, Comp. Laws 1909, which provides for filing a copy of the charter or articles of incorporation with the Secretary of State, and appointing an agent for the service of process, etc., is not charged; but that it has done all these things is admitted by the pleading. Therefore the penalty embraced in section 1541, Comp. Laws 1909, which provides that, for failure to comply with section 1540, *supra*, the contracts of such delinquent corporation shall be void and nonenforceable in the courts of this state, does not apply in this case, and is not up for consideration.

Does the fact that the first section of the act under consideration (chapter 57, Sess. Laws 1910 [section 7538, Rev. Laws 1910]), which prohibits all corporations from doing business in this state without license so to do, invalidate a contract the corporation may make while delinquent? On this question we find three lines of decisions: Many courts hold that all contracts made contrary to the prohibition of a statute are void. *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Thorne v. Travelers' Ins. Co.*, 80 Pa. 15, 21 Am. Rep. 89; *Smith v. City of Albany*, 7 Lans. (N. Y.) 14; *Sharp v. Teese*, 9 N. J. Law, 352, 17 Am. Dec. 479; *Solomon v. Dreschler*, 4 Minn. 278 (Gil. 197); *Wheeler v. Russell*, 17 Mass. 258; *Randall v. Tuell*, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143; *Smith v. Robertson*, 106 Ky. 472, 50 S. W. 852; *Dillon & Palmer v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145. Others hold that, where a statute is designed chiefly for raising revenue, it will be presumed that the Legislature did not intend to invalidate contracts made by delinquents, but that the penalties prescribed in the act were thought to be sufficient to compel its observance, thus protecting and insuring the revenue provided for by the act. *Aiken v. Blaisdell*, 41 Vt. 655; *Rahter v. First Nat'l Bk.*, 92 Pa. 393; *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Babcock v. Goodrich*, 47 Cal. 488. Another line of cases regards the question as one of legislative intent, to be gathered from the language of the act itself construed in the light of its subject-matter, the evils condemned,

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and the remedy proposed, etc. *Pangborn v. Westlake*, 36 Iowa, 546; *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *Union Nat'l Bk. v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Coombs v. Emery*, 14 Me. 404; *Wheeler v. Hawkins*, 116 Ind. 515, 19 N. E. 470.

This court seems to have adopted the views and announced the doctrine followed in the last two lines of decisions. In the case of *Cooper v. Ft. S. & W. Ry. Co.*, 23 Okla. 139, 99 Pac. 785, the court considered this precise question, except that it involved a different statute and a constitutional provision. Section 1225, Wilson's Rev. & Ann. St. (section 1538, Comp. Laws 1909) and sections 43 and 44, art. 9, of the Constitution were under consideration. Section 1225, *supra*, prohibits the transaction of any business, except after doing certain things, which had not been done. The constitutional provisions likewise prohibit the corporation from doing any business until certain steps have been previously taken by it which had, admittedly, not been taken. The court, in an opinion by Justice Turner, reviews and cites the authorities at considerable length, and bases the decision on the question of legislative intent, and says in the syllabus:

"An answer setting up a plea in bar to a suit on promissory note given in aid of the construction of plaintiff's line of railroad, which alleges, in substance, that at the time it was executed plaintiff was and still is a foreign corporation, and as such has failed to comply with Wilson's Rev. & Ann. St. 1903, secs. 1225 and 1227, is bad, as it was not the intent of the Legislature, by inhibiting such corporation from doing business in the state, to deprive it of the right to sue in its courts or to render void contracts made by it in the state, and a demurrer thereto was properly sustained."

And again in *Joiner v. Ardmore Loan & Trust Co.*, 33 Okla. 266, 124 Pac. 1073, the point came under review in this court, and the rule announced in the Cooper case, *supra*, was reiterated, in an opinion by Justice Dunn. The court in that case had under review section 43 of article 9 of the Constitution, and say in the syllabus:

"An answer setting up a plea in bar to an action on a promissory note, which alleges, in substance, that plaintiff was a corporation incorporated under the laws in force in the Indian Terri-

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tory prior to statehood, and was doing business at the time of the admission of Oklahoma into the Union, and so continued to do business to the time of the filing of the action, and that it had not complied with the Constitution and laws of the state of Oklahoma in reference to corporations doing business in the said state at the time the transaction in suit took place, nor at the time of the filing of the action thereon, is not effective as a plea in bar to such action on transactions had by the said corporation, under the provisions of section 43, art. 9, par. 260, Williams' Ann. Const. Okla., and a demurrer to such plea is properly sustained."

We have another expression of this court which seems to be applicable in *Hughes v. Snell et al.*, 28 Okla. 828, 115 Pac. 1105, 34 L. R. A. (N. S.) 1133, Ann. Cas. 1912D, 374, wherein the rule announced in the second line of cases, mentioned *supra*, is followed, the court holding in the syllabus:

"To the general rule that an act in violation of a statute or municipal ordinance forbidding it is void, there is the exception that when the statute or ordinance is for the purpose of raising revenue and does not make the act itself void, and the act is not *malum in se* nor detrimental to good morals."

That the statute we are considering is one for raising revenue is apparent. It provides for a license tax on certain corporations as a condition precedent to their exercising their corporate functions. So under either rule—that of legislative intent, or of revenue statutes—the former decisions of this court are controlling. It therefore follows that, where a corporation has complied with all the requirements of the Constitution and statutes relative to filing copies of their charters or articles of incorporation, and have designated an agent for the service of process as required, a failure to do which would render their contracts void, and close the courts to them, but has failed to report and pay its license tax as required by chapter 57, Session Laws 1910 (sections 7538 to 7549, Rev. Laws 1910), its contracts while in such default are not void, nor is the right to proceed in court to enforce them to be denied.

The answer in this case did not state a defense, and the cause should be reversed and remanded for proceedings in accordance with this opinion.

By the Court: It is so ordered.

Coyle et al. v. Arkansas V. & W. Ry. Co.

COYLE *et al.* v. ARKANSAS V. & W. RY. CO.

No. 2704. Opinion Filed September 2, 1913.

Rehearing Denied March 17, 1914.

(139 Pac. 294.)

1. **RAILROADS—Action on Bonus Note—Petition—Sufficiency.** Where, in an action by a railway company on a bonus note, which under its terms became payable upon performance of certain conditions by the railway company, the petition contains the name of the court, the county in which the action is brought, together with the name of the parties plaintiff and defendant, followed with the word "petition," and contains the allegations of plaintiff's corporate capacity, the date of the execution and delivery of the note, the purpose for which it was given, and the conditions under which it became payable, and that all of the conditions precedent have been performed by the plaintiff, fully stating the facts constituting a compliance therewith, alleges the amount due thereon, together with interest at a certain rate from a certain date, and that such amount is past due and wholly unpaid, that plaintiff is the owner and holder of the note, and attaches a copy thereof as an exhibit to and part of the petition, and prays for judgment for the amount due and interest from the given date, such a petition states a cause of action, and is sufficient under section 5627, Comp. Laws 1909 (Rev. Laws 1910, sec 4737).
2. **EVIDENCE—Parol Evidence—Contemporaneous Agreement.** An instrument reciting: "For value received, and for benefits accruing to me from the construction of a railroad from some point on the St. L. & S. F. Railroad between S. & T., through the city of P., to connect with the B., E. & S. Railway, * * * I * * * agree to pay to the order of A. V. & W. Railway Company, at the Exchange Bank of P., the sum of two hundred and fifty and no-100 dollars, * * * to become due and payable when said railroad shall be constructed to and into P."—is a contract between the parties.
(a) No contemporaneous parol condition or consideration may be engrafted into such contract, so as to add to, vary, or contradict the same, except upon proper allegations of fraud, accident, or mistake—following *Southard v. A. V. & W. Ry. Co.*, 24 Okla. 408, 103 Pac. 750.
3. **CONTRACTS—Railroad Bonus Note—Validity—Public Policy.** A promissory note or obligation, payable to a railway company in aid of the construction of its line between two given points through a certain point, is not void as against public policy—following *Guss v. Federal Trust Co.*, 19 Okla. 138, 91 Pac. 1046; *Guthrie & W. Ry. Co. v. Rhodes*, 19 Okla. 21, 91 Pac. 1119, 21 L. R. A. (N. S. 490); *Cooper v. Ft. S. & W. E. Co.*, 23 Okla. 139, 99 Pac. 795; *Cobb v. Wm. Kenefick Construction Co.*, 23 Okla. 449, 100 Pac. 551; and *Southard v. A. V. & W. Ry. Co.*, 24 Okla. 408, 103 Pac. 750.

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4. **EVIDENCE—Parol—Written Contract.** In the absence of proper allegations of fraud, duress, accident, or mistake, testimony which tends to contradict, change, vary, or add to the conditions or consideration plainly incorporated in a written contract is not admissible.

(Syllabus by Harrison, C.)

Error from District Court, Noble County;

R. H. Loofbourrow. Assigned Judge.

Action by the Arkansas Valley & Western Railway Company against J. E. and Ed. J. Coyle. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry S. Johnston and P. W. Cress, for plaintiffs in error.

Jackson & Eagleton, for defendant in error.

Opinion by HARRISON, C. This action was begun in September, 1904, by the Arkansas Valley & Western Railway Company against J. E. and Ed. J. Coyle on a bonus note executed by defendants in favor of plaintiff to secure the building of a railway into the city of Perry; said note being as follows:

EXHIBIT A.

“\$250.00.

Perry, Oklahoma, May 12, 1902.

“For value received, and for benefits accruing to me from the construction of a railroad from some point on the St. Louis & San Francisco Railroad between Sapulpa and Tulsa, I, T., through the city of Perry, in Noble county, to connect with the Blackwell, Enid & Southwestern Railway, I, the undersigned, agree to pay to the order of the Arkansas Valley & Western Railway Company at the Farmers' & Merchants' Bank at Perry, Oklahoma, the sum of two hundred and fifty dollars. The said amount to become due and payable when said railroad shall be constructed to and into the city of Perry, Oklahoma. It is also provided that, if said road is not constructed before January 1, 1904, this obligation shall be void. J. E. Coyle & Son, by Ed. J. Coyle.”

Defendants answered, and afterwards filed an amended answer, setting up seven separate defenses to plaintiff's petition, to wit: First. Admitting the execution of the note, and by a general denial of every material allegation not admitted, and

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by specifically denying that plaintiff was the owner and holder of the note. Second. That the plaintiff was not the real party in interest, but that the Arkansas Valley & Western Townsite Company was the real party in interest, and the holder and owner of said instrument, and that plaintiff had no capacity to sue. That the plaintiff had no authority under its charter to obtain subscription notes or donations, and that the Arkansas Valley & Western Townsite Company, the real party in interest, having neglected and refused to comply with the laws of the territory regarding the duties of corporations, had no corporate capacity at the time of filing the suit. Third. That said notes were obtained through duress and threats that, unless a certain amount of money was paid to plaintiff, they would locate their line of road some miles north of the city of Perry. Fourth. That the plaintiff had no corporate capacity to transact business in the territory, and had no corporate existence. Fifth. That the proceeds of all bonus notes thus obtained by the townsite company were to go to the townsite company by virtue of a contract between the townsite company and the railway company by which the townsite company was to obtain the right of way through certain counties and towns, the townsite company to have authority thereunder to locate stations and depot grounds, and in consideration therefor to receive whatever bonuses it might obtain. Sixth. That the note in question was one of a series of like instruments aggregating the sum of \$25,000, for which the railway company had promised to build its line into the city of Perry, and which amount had been jointly subscribed by the citizens of the city of Perry, and had been fully paid to plaintiff. Seventh. That, by reason of certain acts of fraud and deceit practiced upon the territorial officers in obtaining its charter, and by reason of having, by collusion with certain officers of the city of Perry, unlawfully appropriated moneys belonging to certain city funds, such railway company had forfeited its right to do business in the territory, and that proceedings should be begun by the territory to annul its charter. Thereafter defendants filed a supplemental answer, alleging as further defenses to said action, first, that the contract entered into and notes sued

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upon were made and executed on Sunday, and were void; second, that said note was obtained for the purpose of inducing others to sign subscription notes, and under promise by plaintiff was to be thereafter returned to defendants.

The cause being called for trial, and a jury impaneled, plaintiff objected to defendants' counsel making a statement to the jury, or offering any testimony in defense, for the reason that the allegations in defendants' amended and supplemental answer did not constitute a defense to plaintiff's cause of action. The court sustained the objection as to the second, third, fourth, fifth, sixth, and seventh defenses in the amended answer, and as to the second defense in the supplemental answer, and refused to allow defendants to make a statement as to either of such defenses, or to offer any testimony in support of same. Defendants excepted, and the cause was tried on the issues formed by the petition and the defenses set up in the first paragraph of each answer. At the conclusion of the testimony, upon motion of plaintiff, the court directed a verdict in plaintiff's favor. While the record does not contain the verdict, nor does the journal entry of judgment show the amount for which judgment was rendered, yet, as counsel for both parties present and argue the case here as though verdict and judgment had been rendered for the full amount sued for, the face of the note and interest, it will be so treated by this court.

The defendants presented motion for a new trial, and appealed from the judgment and order overruling same. The errors relied upon here are those presented in the motion for new trial, to wit:

"First. Irregularities in the proceedings of the court by which these defendants were prevented from having a fair trial. Second. Abuse of discretion by the court, by which these defendants were prevented from having a fair trial. Third. That the verdict of the jury is not sustained by sufficient evidence. Fourth. That the verdict of the jury is contrary to law. Fifth. That the decision, finding, and judgment of the court is not sustained by sufficient evidence. Sixth. That the decision, finding, and judgment of the court is contrary to law. Seventh. Errors of law occurring at the trial and excepted to by these defendants. Eighth.

That the court erred in overruling the motion of these defendants for judgment upon the pleadings. Ninth. That the court erred in overruling the motion of these defendants for judgment upon the pleadings and opening statement of the counsel for plaintiff. Tenth. That the court erred in overruling the demurrer of these defendants to the petition of plaintiff. Eleventh. That the court erred in overruling the motion of these defendants to make the petition more definite and certain. Twelfth. That the court erred in overruling the demurrer of these defendants to the opening statement of counsel for plaintiff, and upon the petition prior to the introduction of evidence. Thirteenth. That the court erred in admitting and receiving evidence in said cause, and upon opening statement and petition. Fourteenth. That the court erred in admitting irrelevant, incompetent, and immaterial testimony and evidence otherwise objectionable offered on behalf of plaintiff over the objection of defendants. Fifteenth. That the court erred in excluding good, relevant, competent, and material testimony offered by these defendants. Sixteenth. That the court erred in directing a verdict for the plaintiff. Seventeenth. That the court erred in taking said cause, and the consideration of the facts proven therein, from the jury. Eighteenth. That the court erred at the trial of said cause in excluding the statements offered by the defendants' counsel on behalf of this defendant, and in sustaining the motion of plaintiff to exclude that portion of defendant's statement, and to exclude all evidence thereupon. Nineteenth. That the court erred in sustaining objection to the introduction of testimony in support of defenses Nos. 2, 3, 4, 5, 6, and 7, and also to the second defense stated in the supplemental answer of this defendant. Twentieth. That the court erred in peremptorily directing a verdict in this case, to all of which rulings and findings of the court the defendant duly excepted, and for the foregoing errors so excepted to, and other good reasons, these defendants move and request a new trial and rehearing in this cause."

The tenth, eleventh, twelfth, and thirteenth errors assigned in the motion for new trial relate to the question whether the allegations in the petition were sufficient to constitute a cause of action. The third, fourth, fifth, sixth, eighth, ninth, sixteenth, seventeenth, and twentieth relate to the sufficiency of the evidence to sustain a verdict under the law. The first, second, seventh, fourteenth, fifteenth, eighteenth, and nineteenth relate to

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and include other irregularities and errors of law occurring during the trial. The propositions involved will therefore be treated under these three groups.

As to the first group of errors, the petition herein is as follows:

"Now comes said plaintiff and states that it is a railway corporation duly organized and existing under and by virtue of the laws of the territory of Oklahoma. That said defendant J. E. Coyle & Son is a partnership composed of Ed. J. Coyle and J. E. Coyle, and for its cause of action against said defendants alleges and says: That heretofore and, to wit, on the 12th day of May, A. D. 1902, the said defendants, J. E. Coyle, and Ed. J. Coyle, partners as J. E. Coyle & Son, made, executed in writing, and delivered to this plaintiff their certain promissory note of that date, and did thereby, for value received, and the benefits accruing to them from the construction of a railroad from some point on the St. Louis & San Francisco Railroad between Sapulpa and Tulsa, I. T., through the city of Perry, Noble county, Okla., to connect with the Blackwell, Enid & Southwestern Railway, agree to pay to the order of the Arkansas Valley & Western Railway Company, at the Farmers' & Merchants' Bank at Perry, Okla., the principal sum of \$250, said amount to become due and payable when said road shall be constructed to and into the city of Perry, Okla. It was provided in said note that, if said railroad is not constructed before January 1, 1904, said obligation shall be void. A copy of said note is hereto attached, marked Exhibit A, and made a part of this petition, the same as if herein set out in full. Plaintiff further states that it is the owner and holder of said note; it has performed all the conditions precedent on its part; that said railway was duly constructed from Tulsa, I. T., a point on the St. Louis & San Francisco Railroad, through the city of Perry, Noble county, Okla., to Enid, Okla., where it connects with the Blackwell, Enid & Southwestern Railway; that said railway was constructed to and into the city of Perry, Okla., in October, 1903, and regular train service was inaugurated on said railway on the 28th day of December, A. D. 1903; that, by reason of the construction of said railway and the inauguration of regular train service, said note became due and payable on and prior to December 28, 1903. Plaintiff further states that said note is long past due and wholly unpaid; that plaintiff has demanded payment, and defendants refuse to pay same, or any part thereof, and that there is due plaintiff the sum of \$250, with interest thereon from December 28, 1903, amounting to

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\$11.66, together with interest on both of said amounts from September 5, 1904, at 7 per cent. per annum. Wherefore plaintiff prays for judgment against said defendants, and each of them, in the sum of \$261.66, together with interest thereon from September 5, 1904, at 7 per cent. per annum, and costs."

We think this petition very clearly states a cause of action, and that it is sufficiently definite and certain as to all the material allegations.

As to the second group of errors assigned, those relating to the sufficiency of the evidence, we have read the record closely, and believe that the evidence fairly sustains the judgment on the issues tried; that is, the issues presented by the petition and the first paragraph of each of defendants' answers. The question, then, is whether the court erred in excluding the other defenses, and confining the defendants to the issues formed by the pleadings above mentioned, which brings us to a determination of the third group of errors assigned in the motion for new trial, namely, those relating to "other irregularities and errors of law occurring at the trial," all of which are included within the nineteenth assignment in the motion, and will be disposed of by determination of that assignment.

The proposition presented in the second defense set up in the supplemental answer, being that the note was given for the purpose of inducing others to sign like notes, and was to be returned, without payment, to the maker, involves the question of defendants' right to introduce testimony tending to vary the terms of a written contract, and is disposed of in the case of *Southard v. A. V. & W. Ry. Co.*, 24 Okla. 408, 103 Pac. 750, wherein this court, in discussing the identical question, said:

"In this jurisdiction we are governed by statute, however, which is substantially declaratory of the common law. Section 781 (chapter 15, arts. 2, 52) Wilson's Rev. & Ann. St. 1903 (section 822, St. Okla. 1893), provides that 'the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' In the case of *Guthrie & Western Ry. Co. v. Rhodes*, 19 Okla. 26, 91 Pac. 1119 [21 L. R. A. (N. S.) 490], this statute is construed under a bonus note contract very similar to the one

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involved here, and it was there held that under said statute the execution of a contract in writing supersedes all the oral negotiations or stipulations concerning the terms and subject-matter which preceded or accompanied the execution of the instrument, and, where a note was given as subscription to a railroad to aid in the construction and building of said road, any representations made prior to or contemporaneous with the execution of the note are inadmissible to contradict, change, vary, or add to the conditions or consideration plainly incorporated in and made a part of said note. See, also, *McVinch v. Northwest Thresher Co.*, 23 Okla. 286, 100 Pac. 525 [138 Am. St. Rep. 803]; *Threlkeld et al. v. Steward et al.*, 24 Okla. 403, 103 Pac. 630 [138 Am. St. Rep. 888]. However much we might feel inclined to permit, under the facts here, the introduction of the testimony offered by the plaintiff in error, yet, in view of the section of the statute heretofore quoted, and the practically uniform holdings of the courts of this republic, we are not permitted so to do."

With the exception of the fourth defense set up in the amended answer, which is a denial of plaintiff's corporate capacity, and the allegations of fraud and duress in procuring the note, the remaining defenses interposed in the amended answer present the same legal questions involved in the Southard case, *supra*, and are controlled by the rule in that case. In fact the two cases are so nearly identical in questions of law involved that we see no material distinction between them. Testimony of the same import as that offered in the case at bar was held inadmissible in the Southard case, because it tended to contradict or varify the plain terms of the note sued on, and the rule announced in that case is followed here. As to the fourth defense, the plaintiff's corporate capacity was alleged in the petition, and such fact, not having been denied under oath, is, under section 5648, Comp. Laws 1909 (Rev. Laws 1910, sec. 4759), to be taken as true.

As to the question of fraud and duress, the facts alleged are not sufficient in law to constitute duress. In fact defendants do not urge that they were forced to sign the note against their will, nor do they allege acts of fraud, by which they were misled and deceived into signing it. The fact that plaintiff represented that the road would be built to some other point unless a bonus

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was raised does not of itself present such duress as would render the note void. The defendants may have expected to be benefited to the full amount of the note by securing the railway, and they do not specifically deny that they were so benefited. Nor does the mere fact of the representation that the road would be built to some other point constitute such an act of fraud as would vitiate the note. There is nothing in the record to show that the road would not have been built to some other point if the bonus had not been raised. Nothing to show that such representations were false, or that defendants were deceived or misled thereby. The action is distinguishable from the case of *Cooper v. Ft. Smith & Western R. Co.*, 23 Okla. 139, 99 Pac. 785, for in the Cooper case it was alleged and shown that, after the railway company had already entered into a contract with the citizens of Guthrie for the construction of the road into that city, a meeting of the citizens who knew nothing of the contract was called, and the representation made that, unless a bonus of \$50,000 was raised, the line of railway would be diverted and built through a rival town, and that such citizens, not knowing that a contract for the construction of the road into Guthrie had already been entered into, and not knowing the falsity of the statement that the road would be built to some other point, but relying on the truth of such statement, were induced to sign the bonus notes. In the case at bar no such facts existed. It does not appear from the record that the representations were false, and that defendants were deceived by their falseness. Hence, upon a consideration of the entire record, under the doctrine of the Southard case, we see no reversible error.

The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

SOUTHWESTERN LAND CO. v. McCALLAM.

No. 2931. Opinion Filed November 25, 1913.

Rehearing Denied March 17, 1914.

(136 Pac. 1093.)

1. **REWARDS—Public Offer of Prize—Petition—Essential Allegations.** In an action to recover a prize which has been offered by defendant and which is to be paid pursuant to an award to be made by a jury selected under specific conditions set forth in the offer, it is essential that plaintiff allege either that such prize had been awarded as provided in the offer, or that such award, stating the facts, had been prevented by some fault of defendant.
2. **SAME—Submission of Issues—Conflicting Evidence.** And where plaintiff's right of recovery depends upon whether such award has been made under the conditions of the offer, and such fact is to be determined from conflicting testimony, it is error to refuse to submit such issue to the jury.

(Syllabus by Harrison, C.)

Error from County Court, Choctaw County;
W. T. Glenn, Judge.

Action by Olivia McCallam against the Southwestern Land Company on a contract. Judgment for plaintiff, and defendant brings error. Reversed.

E. H. Foster and R. E. Stephenson, for plaintiff in error.

B. D. Jordan, for defendant in error.

Opinion by HARRISON, C. This cause was tried in the county court of Choctaw county in February, 1911, upon an appeal from a judgment rendered against the Southwestern Land Company in the justice court of said county. The suit was upon the following proposition or notice which was published in the newspaper, and which plaintiff accepted and brought suit as upon a contract, to wit:

“EXHIBIT A.

“\$100.00 in Gold to be Given Away.

“A free contest for the purchasers of lots in Frisco addition. The Southwestern Land Company has deposited in the

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Hugo National Bank \$100.00 in gold to be paid for the best article stating reasons why Hugo is going to be one of the largest cities in the new state of Oklahoma and why Frisco addition is sure to be the most desirable residence portion of Hugo.

"Frisco addition lots are sure to double in value within one year and you can make money by entering this contest whether you secure the \$100 in gold or not. If you do win the gold then you will be amply repaid for the time you put in thinking.

"This contest is open to all purchasers of lots in the Frisco addition and those who have made purchases previous to August 20th will be allowed thirty days from that date to submit any article they may desire to offer in the contest. Those who purchase hereafter will be allowed thirty days from date of purchase.

"On January 1st three disinterested persons shall be chosen by the majority of the purchasers present to decide who is entitled to the \$100 in gold and the money shall be promptly paid to the person who offers the best article according to the decision of the judges to be selected.

"This money will be paid to the purchaser who writes and delivers to us within thirty days after purchase is made, the best article not to contain more than three hundred words, giving reasons why Hugo should have a population of twenty-five thousand in five years and why Frisco addition is sure to always be the most desirable residence portion of the city.

"If you are familiar with Hugo's surroundings and will stop and think for a moment, you can clearly see why Hugo is sure to be one of the largest cities in the new state of Oklahoma and, if you do not know why Frisco addition is going to be the most desirable residence portion of Hugo, all you have to do to be convinced of this fact is to go out and look it over and then compare its advantages with other portions of Hugo.

"The excellent drainage, the productive soil, the beautiful shade trees, the abundance of pure soft water and the fresh pure air are a few of the many advantages to be taken into consideration when you go to build your home.

"Frisco addition lots are being sold on long terms and easy payments. Buy a lot and win \$100 in gold.

"THE SOUTHWESTERN LAND CO.,

"Hugo, I. T."

The foregoing notice was attached to and made part of the following bill of particulars:

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“That defendant, on or about the 20th day of August, 1907, published in the Choctaw County Chronicle, a newspaper published in the city of Hugo, an offer of \$100 for the best article written by any one giving reasons why Hugo should have a population of 25,000 within five years, and why the Frisco addition is sure to always be the most desirable residence portion of said city. The plaintiff wrote the only article, and complied with all the terms and conditions of said contract; that said article was delivered to defendant and accepted by it; that plaintiff has made demand on defendant for the payment of said \$100, but that said defendant has refused, and still refuses to pay the same. Wherefore plaintiff prays judgment against said defendant in said sum of \$100.”

Defendant demurred to the bill of particulars for failure to state a cause of action, in that it failed to show that plaintiff had performed all of the conditions precedent to recovery. The demurrer was overruled because of the general allegation “that plaintiff wrote the only article and complied with all of the terms and conditions of said contract.” The court’s action in this regard is assigned as error; but, while the allegation may be too general and too indefinite to constitute good pleading, yet we think it might be held sufficient in this regard as against a general demurrer. However, the plaintiff’s right of recovery on the contract sued upon must rest, not only on the fact that she had written the article and submitted it to the company, but that the \$100 gold prize had been awarded to her by a decision of three disinterested persons to be chosen as provided in paragraph 4 of the contract, or that, having performed all things incumbent upon her under the contract, she had been deprived of such decision by some fault of the company. The allegations in this regard we think are insufficient.

Besides, in the trial of the case the defendant offered the following instructions which the court refused to give, to wit:

“First. Unless you find that there was an appointment by the purchasers of three judges and that said article of plaintiff’s was submitted to them for their judgment, then you will find for the defendant. Second. Unless you further find that the article claimed to have been written by plaintiff was submitted to judges appointed by the purchasers of lots in said addition, and unless

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you further find that said judges found said article to be the best written, then you will find for the defendant."

This was a material issue in order to determine plaintiff's right of recovery. She evidently had no right of recovery unless the prize had been awarded to her by a jury selected as provided in the contract. That is, unless such award or decision had been prevented by some fault of defendant, and this being a material issue to be determined by the jury from the evidence, inasmuch as such issue was not covered or presented to the jury by the court's charge, we think it was error to refuse the instructions offered.

In the case of *Trego v. Pennsylvania Academy of Fine Arts* (Pa.) 3 Atl. 819, the identical question of pleading and issue of fact as to plaintiff's right of recovery were involved. In that case the court said:

"The manifest meaning of the proposal is that prizes would be given in pursuance of awards, and not contrary thereto. The persons who shall compose the 'jury of awards' is stated in the offer. They were to constitute the tribunal to pass upon the merits of the paintings, and to decide to which prizes should be awarded. Unless so awarded by this jury, no prize was demandable."

We think that the issue of fact tendered by defendant in the offered instructions should have been submitted to the jury, and that the court erred in refusing to submit same.

The judgment should be reversed, and the cause remanded.
By the Court: It is so ordered.

TURNER et al. v. CITY OF ARDMORE et al.

No. 2322. Opinion Filed February 18, 1913.

Rehearing Denied March 17, 1914.

1. **EQUITY—Jurisdiction—Adequate Remedy at Law.** Plaintiffs obtained an order restraining the City of Ardmore from prosecuting them for refusing to pay an occupation tax assessed against them by such city. **Held**, such order was erroneous for the reason that plaintiffs had an adequate remedy under the statutes by appeal from the judgment of the municipal courts.

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2. **SAME.** Courts of equity will not grant relief where complainants have a plain, speedy and adequate remedy for the redress of their wrongs under the law. This doctrine is universally recognized by courts of equity and is founded upon the very sound principle that legislatures have authority to define the rights of citizens and prescribe the rules by which such rights are to be determined, and where it has done so, then litigants have the right to demand that their grievances be determined by the rules prescribed.

(Syllabus by Harrison, C.)

Error from District Court, Carter County;
S. H. Russell, Judge.

Action by R. F. Turner and others against the City of Ardmore and others for an injunction. Judgment for plaintiffs, and defendants bring error. Reversed.

Thos. Norman, for plaintiffs in error.

J. B. Moore, for defendants in error.

Opinion by HARRISON, C. This is an action wherein R. F. Turner and some eighteen other resident attorneys of the City of Ardmore sued to enjoin the municipal court of such city from prosecuting them for refusal to pay an occupation tax of \$5 each assessed by the city against each practicing attorney. The application was heard, and order of injunction granted by the judge of the district court May 31, 1910, and from the order of injunction, the city of Ardmore appeals.

The question whether the court was authorized to grant the prayer for the injunction depends in this case solely upon the ground whether or not the plaintiffs had an adequate remedy at law for the things complained of. We hardly feel disposed to treat the question of the validity of the ordinance imposing the license tax as properly before the court. The petition for the injunction seems to be based more upon the ground that petitioners had been arrested and were being prosecuted by the municipal court for failure to pay such tax, and the court seems to have granted the order upon this ground.

Now if plaintiffs had been arrested for refusal to pay an illegal tax, and such tax were in fact illegal, and such plaintiffs were being prosecuted for refusal to pay same, this would con-

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stitute sufficient grounds for an injunction against the city, provided the applicants had no adequate remedy at law for relief from the abuses complained of. But if they had an adequate remedy under the law, and in the courts of law, then a court of equity was not authorized to intercede and grant relief until the rights of the parties had been determined under the law or until their remedy under the law had been exhausted. If plaintiffs had been wrongfully arrested under process issued from the municipal court and were being prosecuted or threatened with prosecution in such court for the violation of an invalid ordinance, section 746, Comp. Laws 1909 [Rev. Laws 1910, sec. 659], affords a plain, specific, speedy, and adequate remedy for redress of such wrongs by appeal to the district court, where the legality of the tax and the prosecution could both have been determined, and the rights of the parties adjudicated, and having such remedy at law, the petitioners should have resorted to a court of law for redress of their wrongs. A court of equity will not grant relief in such matters where an adequate remedy is provided by law. *Golden v. City of Guthrie*, 3 Okla. 128, 41 Pac. 350; *Wallace v. Bullens*, 6 Okla. 17, 52 Pac. 957; *Thompson v. Tucker*, 15 Okla. 486, 83 Pac. 413; *Smith v. Board of Com'rs*, 26 Okla. 819, 110 Pac. 669; *Fast v. Rogers et al.*, 30 Okla. 289, 119 Pac. 241.

This doctrine is founded upon the very sound principle that the Legislature has authority to define the rights of citizens and prescribe the rules by which such rights are to be determined; and where it has done so, then litigants have the right to demand that their grievances be determined by the rules prescribed.

In the case at bar, the plaintiffs showed by their petition that they had a remedy at law of which they had not availed themselves. It is true that they alleged "that said city has heretofore declined and refused, and will in the prosecution against these defendants, decline and refuse, to allow these plaintiffs a trial by jury; and said city has declined and refused, and will in the prosecution against these plaintiffs, decline and refuse, to allow an appeal from whatever decision the judge of said mu-

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nicipal court may render." These allegations are not sufficiently definite and certain upon which to base equitable relief. It is true, also, that plaintiffs alleged that they had no adequate remedy at law, but such allegation does not destroy nor affect the remedy which the law provides. The allegations disclose a state of facts for redress of which the law prescribes a remedy as above stated. Hence, mere allegations that they had no adequate remedy at law would not warrant the intercession of a court of equity unless such allegations were true.

Therefore, the judgment of the trial court should be reversed, with instructions to dissolve the injunction.

By the Court: It is so ordered.

MAKER v. TAFT *et al.*

No. 2926. Opinion Filed March 24, 1914.

(139 Pac. 970.)

BILLS AND NOTES—Extension—Consideration. In an action in replevin brought to secure the possession of property described in a chattel mortgage given to secure the payment of a promissory note, and where the defendants deny the unlawful detention of the property, and, in support thereof, set up in their answer that a payment had been made on said note after its maturity of a sum less than the interest then due, and a promise made by the creditor to extend the time of maturity of the note beyond the time of the commencement of the action, held, there was no consideration for such promised extension, and a demurrer to the answer on the ground that it failed to set out facts sufficient to constitute a defense was well taken, and should have been sustained.

(Syllabus by Galbraith, C.)

Error from Superior Court, Custer County;

J. W. Lawter, Judge.

Action in replevin by J. A. Maker against S. D. Taft, Mary Taft, and L. P. Taft. Judgment was for the defendants, and plaintiff brings error. Reversed.

Andrew J. Welch, for plaintiff in error.

Phillips & Mills, for defendants in error.

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Opinion by GALBRAITH, C. This was an action in replevin commenced April 3, 1911, for the purpose of obtaining the possession of certain horses and cattle described in a chattel mortgage given for the purpose of securing a promissory note for \$582. The note being past due, the mortgagee sought the possession of the property in order that he might foreclose the same. The order of replevin was issued, and the property seized and sold after posting notice the required time, and the proceeds of the sale applied in payment of the amount of the note and interest and costs, and a small balance of \$36 remaining in the hands of the mortgagee was offered to the defendants, and by them refused. The defendants filed a joint answer to the petition in replevin, in which they admitted the execution of the note and mortgage, but denied that they were unlawfully in the possession of the property at the time of the commencement of the suit, for the reason that the maturity of the note and mortgage had been extended for six months a short time prior to filing the suit, and specially pleaded that:

"On or about the —— day of April, 1911, and before the beginning of this action, said defendants paid to the plaintiff the sum of \$50 on said debt, and, as consideration therefor, the plaintiff has promised and agreed with the defendants that said note and mortgage was extended for a period of six months from said —— day of April, 1911."

To this answer the plaintiff demurred, on the ground that the same did not state facts sufficient to constitute a defense to the action. The demurrer was overruled and time given to plead. The issues were regularly formed later, and the cause submitted to trial to the court and a jury, and a verdict returned for the defendants for the value of the property, fixed in the sum of \$1,100, in case of the failure to return it, and \$75 for unlawful seizure of the same. To reverse this judgment, the plaintiff has perfected an appeal to this court.

Since the filing of the appeal in this case, the death of the defendant in error Stephen D. Taft has been suggested, and by agreement said cause is revived in the name of his administrator, Chas. W. Brewer, as one of the defendants in error.

Opinion of the Court.

The principal question raised on this appeal is as to whether or not the defendants' answer stated a defense. This question was raised, first, by the demurrer, and, again, by the objection to the introduction of testimony, and, again, by a demurrer to the evidence after the defendants had closed their case.

It appears that the note and mortgage bore date of April 11, 1910, and the note was due October 11, 1910, bearing interest at the rate of 10 per cent. from date, and that about April 1, 1911, the note being past due, and the amount of the interest then accrued amounting to \$56.58, the defendants paid \$50 on the debt, and claimed that the plaintiff agreed at that time, in consideration of that payment, that the maturity of the note should be extended until the following fall. In urging his demurrer, the plaintiff contended that this agreement, if made, was not binding for two reasons: First, because made without consideration; and, second, because, the note being a contract in writing, a verbal agreement to extend was invalid.

It is also contended that, in paying the \$50 interest already due, the defendant was doing no more than she was already legally bound to do, and that therefore there was no consideration for the agreement to extend the payment of the note. In *Anson on Contracts*, 11 Eng. Ed. (2 Am. Ed.) 104, the test as to whether or not there is a consideration for a contract is stated as follows:

—“(a) Did the promisee do, forbear, suffer or promise anything in respect of his promise? (b) Was his act, forbearance, sufferance or promise of any ascertainable value? (d) Was it more than he was already legally bound to do, forbear or suffer?”

This is a clear statement of the rule, and there is no doubt that the tests here laid down are the only proper ones, but the difficulty is in making the application. The authorities upon this proposition are in irreconcilable conflict, and it is for this court to decide which line of authorities to follow upon this proposition. In *Dudley v. Reynolds*, 1 Kan. 285, it was held that a parol agreement by the parties to a note made after its maturity that, if the maker would pay a certain sum thereof, which sum was then paid, the remaining sum should draw a rate

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of interest less than that specified in the note, was without consideration, and not binding. In that case the note originally drew interest at the rate of 5 per cent. per month. Under the parol agreement, the maker of the note paid \$175 after the whole note was due, upon an agreement that the remaining sum should draw interest at 2 per cent. per month thereafter. The court held that this agreement was without consideration and not binding upon the payee, and that he could recover the balance due, with interest at the rate of 5 per cent. per month.

In the case of *Jenness v. Cutler*, 12 Kan. 500, it was held, in a case where the question was as to whether or not a surety was discharged, where the creditor and principal debtor, after the debt had become due, made an agreement, without the knowledge or consent of the surety, that the time of the payment of the debt be extended for one year in consideration of a bonus to be paid by the debtor over and above the highest legal rate of interest, that the agreement for the extension was not binding, and that the surety was not discharged.

In the case of *Royal v. Lindsay*, 15 Kan. 591, it was held that a promise to pay interest monthly instead of annually was a sufficient consideration for the extension of a note, but Mr. Justice Brewer, in the course of the opinion, said:

"That a promise to pay interest for a definite period of time is a sufficient consideration for an agreement to extend for a like period the day of payment is affirmed by these authorities: *Wheat v. Kendall*, 6 N. H. 504; *Bailey v. Adams*, 10 N. H. 162; *Chute v. Pattee*, 37 Me. 102; *McComb v. Kittridge*, 14 Ohio, 348. It is denied in *Reynolds v. Ward*, 5 Wend. [N. Y.] 502; *Kellogg v. Olmsted*, 25 N. Y. 189; *Parmelec v. Thompson*, 45 N. Y. 58 [6 Am. Rep. 33]; *Gibson v. Irby*, 17 Tex. 173; 2 Parsons on Notes and Bills, 528. It is perhaps not necessary that this question shall in this case be definitely decided, though we may say that the suggestions made in favor of the proposition by the court in the case from 14 Ohio seem to us of great force. We prefer to rest our decision upon what seems less doubtful grounds, viz., the promise to pay interest in a different manner from that prescribed in the note."

In *Prather v. Gammon*, 25 Kan. 379, which was an action involving the question for release of sureties, it was held that

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the payment of \$40 on a note after it became due, and the further sum of \$1 to the officers of the bank in which the note was placed for collection, to pay them for their trouble in extending the note, and which was not to be received by the payee on the note, was no consideration for the extension of the note, and did not release the surety. In the course of the opinion, Mr. Justice Valentine said:

"It was extended only to October 1, 1876; and it does not appear that Busby ever paid anything for the extension, except the payment of \$40 on the note. And the payment of this \$40 was a payment of only a portion of what was then due on the note, and of what the plaintiffs were at that time entitled to receive; for the whole note at that time, amounting to \$165, and interest, was already due, and had been due for some months; and therefore such payment could not constitute a sufficient consideration for a new and valid agreement for the extension of the time for the payment of the note to some future period of time. * * * And the \$1 (even if paid) could not be a consideration to the plaintiffs for extending the time, for they were not to receive the dollar, and did not know anything about it."

In *Dare v. Hall*, 70 Ind. 545, it was held that, to release a surety on account of the extension of time to the principal, the extension must have been upon a new consideration, and that the payment of interest already due upon the note did not constitute such new consideration. It was also held that an agreement to continue the payment of interest at the same rate as specified in the note, or an agreement to provide paying interest at a reduced rate, created no new consideration for the extension of the note. To the same effect is the case of *Wilson v. Powers*, 130 Mass. 127; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685 (opinion by Alton B. Parker); *Kellogg v. Olmstead*, 25 N. Y. 189; *Sully v. Childress*, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875; *Davis v. Stout*, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

There are authorities equally as strong upon the other side of this proposition. In the case of *Chute v. Pattee*, 37 Me. 105, the court said:

"The agreement of the principal to pay interest for a specified time after the note became due furnished a sufficient con-

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sideration for the promise to delay. Both agreements were valid and binding upon the parties respectively, and enabled each to accomplish what he appears to have considered a desirable purpose."

In *McComb v. Kittridge*, 14 Ohio, 348, the court, in language referred to by Mr. Justice Brewer, in *Royal v. Lindsay*, 15 Kan. 591, said:

"It is just as competent for the principals to a note to extend the time of payment for a specified period as it was to fix the time of payment originally. If the lender of money, secured by a note, after the same becomes due, contracts with the borrower that the time of paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the year; and the borrower precludes himself from getting rid of the payment of the interest by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege, at any time, of getting rid of the payment of interest by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest is also relinquished for such period. Here, then, are all the elements of a binding contract. But it is said there is no consideration for the extension of time, because the law gives six per cent. after the note is due. But the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of the time as there was for the original loan. The consideration of the loan, on the part of the borrower, is the payment of interest. If there was no law limiting the amount of interest, the parties might contract for any rate they pleased. A contract to forbear the collection of a debt for a specified period, in consideration of the payment of a rate of interest beyond what the law allows, is founded upon a valid consideration. This would never have been doubted at all, if the law had not fixed the rate for which collection could be had. But, by limiting the rate of interest, the law does not declare that such rate is not a valuable consideration, but, on the contrary, declares that such rate is so fully valuable, that it will not permit a higher rate for the use of money or forbearance."

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Wood v. Newkirk, 15 Ohio St. 295. The same rule is laid down in the state of Texas. *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128. And in Minnesota. *Simpson v. Evans*, 44 Minn. 419, 46 N. W. 908. See *Faucett v. Freshwater*, 31 Ohio St. 637.

In the case of *Lorimer v. Fairchild*, 68 Kan. 328, 75 Pac. 124, the court held that a written extension agreement by which the maker of a note agreed to keep the loan for a certain period, and to pay the interest during such period, was a sufficient consideration for the extension of the loan. We are constrained to follow the line of decisions holding that the promised extension, if made as set out in the defendants' answer was without consideration and void. The entire debt at the time of this payment being past due, and the interest then accrued amounting to more than the amount paid, and defendants not having paid or agreed to pay any more than they were under obligation to pay at that time, and not having paid any greater rate of interest than was provided by the terms of the note and mortgage, there was not, in any aspect of the case, a consideration passing from the maker of the note to the payee sufficient to support the alleged promised extension, and for that reason the answer did not set out facts sufficient to constitute a defense and the demurrer thereto should have been sustained. The same objection, raised at the subsequent stages of the trial, was well taken, and the denial thereof was prejudicial error.

On account of these errors, the judgment appealed from should be reversed, and said cause remanded to the superior court of Custer county for further proceedings not inconsistent with the foregoing opinion.

By the Court: It is so ordered.

Trueblood v. Johnson.

TRUEBLOOD v. JOHNSON.

No. 3086. Opinion Filed March 24, 1914.

(139 Pac. 957.)

INDIANS—Allotment—Removal of Fencing. E. B. Johnson, a Chickasaw Citizen by blood, under a prevailing custom in the Chickasaw Nation, had inclosed and improved more land than he was permitted to select as allotment for himself and family. A part of the land thus inclosed and improved by him had been selected by and allotted to Mary J. Trueblood. After she had moved onto the allotment, Johnson sought to remove the fencing which he had placed on and around same prior to allotment. **Held**, acting within a reasonable time, he had the right to remove his fencing.

(Syllabus by Harrison, C.)

*Error from District Court, McClain County;
R. McMillan, Judge.*

Action by Mary J. Trueblood against E. B. Johnson to restrain defendant from removing improvements from an allotment. From a judgment in favor of defendant, dissolving a temporary restraining order, plaintiff brings error. Affirmed.

J. W. Hocker, for plaintiff in error.

J. F. Sharp, John E. Lutrell, and J. B. Dudley, for defendant in error.

Opinion by HARRISON, C. The facts in this case are that Mary J. Trueblood had selected an allotment, upon which improvements, consisting of a house, sheds, an orchard, and fences had been made by Johnson prior to the selection of the allotment by Trueblood. There is no controversy between the parties over the right to the allotment, but after it had been awarded to plaintiff Johnson sought to remove certain improvements, and Trueblood obtained a temporary restraining order against his so doing. The cause came on for final hearing in February, 1911, at which time judgment was rendered dissolving the temporary restraining order and ordering the plaintiff's petition dismissed, and that plaintiff be adjudged to pay the costs incurred. From

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this judgment, plaintiff appeals upon three assignments of error, all of which are determined under the question whether or not Johnson had the right to remove the improvements which he had placed on the premises prior to allotment.

It is unnecessary to decide in this case whether Johnson had the right to remove the sheds and house and orchard, as in his answer he expressly waives the right to remove anything except some hog fencing and some barbed wire fencing which he had placed on a portion of the allotments. The contention of plaintiff in error that the improvements, consisting of the house, sheds, windmill, and orchard, became a part of the realty and passed to Trueblood with the award to her as allottee, is immaterial in this case, and the authorities cited in support of such contention are not decisive of the question herein involved, for the reason, as above stated, that defendant expressly waived all right to any of the improvements except the fencings. The question here is whether this wire fencing constituted such a permanent fixture as to become a part of the realty, the title to which passed with the title to the realty, or whether it is of a chattel character, that could be removed from the premises.

It must be borne in mind that Trueblood came into possession of this allotment, not by a conveyance from Johnson, in which case we think the rule of law would be different, and Johnson would be held to have conveyed all the improvements on the premises, unless expressly reserved in the instrument of conveyance; but in this case Johnson had placed the improvements in question upon these premises, and had used and occupied them for a number of years, up to the time of the selection of allotments, and under an existing custom or regulation which permitted such things to be done. Although the allotment had been awarded in December, 1903, it was not taken possession of by the allottee until January, 1905, and it was in February, about the 10th or 12th, that Johnson sought to remove the fences.

In *Winans v. Beidler*, 6 Okla. 603, 52 Pac. 405, it was held that:

"A homestead settler, who makes improvements upon a tract of government land and whose entry is afterwards canceled,

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may remove the same after the land has been awarded to an adverse settler."

Also in *McGlassen v. State*, 9 Okla. Cr. 135, 130 Pac. 1174, in a criminal action, wherein J. N. McGlassen was being prosecuted for maliciously removing fencing which he had placed on an allotment prior to the time of its being allotted, the Criminal Court of Appeals held:

"(a) Prior to allotment, the lands of the Choctaws and Chickasaws were held in common, and, until legislation providing for allotment was passed, any member of such tribes had a right to inclose and occupy any unoccupied portion of the lands belonging to his tribe. (b) A member of the Choctaw or Chickasaw Tribe, who was entitled to an allotment of the lands of said tribe, and who, after taking such allotment for himself and family, had improvements remaining on other lands, was entitled to remove the same, or to sell such improvements to other members of said tribe who were entitled to take allotment, or remove them, at his option."

We think that the rule announced in the foregoing authorities may be correctly and justly applied to the case at bar, and that the defendant, Johnson, acting within a reasonable time after Trueblood had gone into possession of the allotment in question, under the circumstances disclosed by this record, should be allowed to remove his fencing, and that the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

FARMERS' STATE BANK *et al.* v. COX.

No. 3211. Opinion Filed March 24, 1914.

(139 Pac. 952.)

FRAUDS, STATUTE OF—**Contract for Sale of Land.** A contract for the purchase or sale of real estate, not being in writing, comes within the statute of frauds, and cannot be enforced, nor can damages arising from a breach thereof be recovered.

(Syllabus by Harrison, C.)

Error from County Court, Stephens County;
W. H. Admirc, Judge.

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Action by J. E. Cox against the Farmers' State Bank and A. S. Bennett. Judgment for plaintiff, and defendants bring error. Reversed.

H. B. Lockett, for plaintiffs in error.

J. B. Wilkinson, for defendant in error.

Opinion by HARRISON, C. This was an action for possession of a promissory note for \$200 held in escrow by the Farmers' State Bank, the same having been executed by A. S. Bennett and placed in said bank by the plaintiff, J. E. Cox, and A. S. Bennett, against a \$200 check executed by John E. Cox as a forfeit in the event of failure of a certain land deal between Cox and Bennett. The facts disclosed by the record are that Cox contracted to sell Bennett a certain 110-acre tract of land, agreeing to convey a perfect title, for the sum of \$2,000. Cox was to execute a deed to Bennett, and Bennett was to make application for a loan of \$1,000, and execute a mortgage therefor on the land in question, and Cox was to assist in procuring the loan in question, the proceeds of which were to be paid to Cox as part payment of the purchase price of the land, and each agreed to put up \$200. Bennett put up the note for \$200, and Cox put up his check for a like amount. The contract failed to go through. Cox obtained the loan, or had arrangements perfected by which such loan could be obtained, and Bennett refused to carry out his terms of the contract, and Cox demanded the note, which the bank refused to turn over to him, and Bennett refused to consent that it be turned over. Hence this action for possession of the note. There was some controversy as to the time in which Cox should have procured the loan and as to the length of time such loan should run; it being contended by Bennett that the basis of the agreement between him and Cox was that Cox should furnish an abstract showing perfect title, that he should furnish it within a given time, and that the loan was to run ten years and be obtained within a certain time, and it being contended by Cox that Bennett had consented to the five-year loan, that the same had been obtained within a reasonable time, and that the title to the premises was good.

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The cause was tried in February, 1911, and verdict and judgment rendered for plaintiff for the possession of the note in question. From such judgment defendants appeal; the material propositions presented being that the contract sued upon—that is, the contract upon which plaintiff based his right of possession of the note—being for the sale of real estate, and not being in writing, came within the statute of frauds, and was therefore nonenforceable; also that the court erred in giving certain instructions, and in refusing certain instructions, and that the verdict was contrary to law and evidence. A determination of the validity or enforceability of this contract decides the case. The other errors complained of are therefore immaterial to its decision. The real basis of plaintiff's cause of action was damages arising from the breach of the contract for the purchase and sale of real estate. This contract was altogether in parol, and the controversy over its terms and conditions formed the issues of fact in this case.

It is contended by defendant in error that the contract was not verbal; such contention being based upon the fact that there was a note in writing, and a check in writing, and a deed of conveyance in writing, and an application for a loan in writing, etc., and that, therefore, the contract was not verbal. But none of these instruments disclose any of the terms and conditions of the contract upon which plaintiff's right of recovery rested. The contract for the purchase and sale was that certain things should be done, and done within a certain time, and that a failure to do them would subject the party who failed to comply with the conditions in the contract to the penalties therein provided for—that is, forfeiture of the note or check. There was no writing, nor memorandum, by which the terms and conditions under which the agreement on the part of one to pay and on the part of the other to sell, or the conditions or circumstances under which the forfeiture should be paid to one or the other, can be determined. But the entire agreement is rested in parol, and therefore comes clearly within the statute of frauds (section 1089, Comp. Laws 1909; section 941, Rev. Laws 1910), and under the authority of *Fox v. Easter*, 10 Okla. 527, 62 Pac. 283,

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Grant et al. v. Milam, 20 Okla. 672, 95 Pac. 424, *Crabtree v. Eufaula Cotton Seed & Oil Co.*, 32 Okla. 465, 122 Pac. 664, *Harris v. Arthur*, 36 Okla. 33, 127 Pac. 695, and *Levy v. Yarbrough*, 41 Okla. 16, 136 Pac. 1120, a parol contract for the purchase or sale of real estate cannot be enforced, nor can damages be recovered for the breach of such contract.

The judgment, therefore, must be reversed.

By the Court: It is so ordered.

WALTON *et al.* v. KENNAMER *et al.*

No. 3248. Opinion Filed March 24, 1914.

(139 Pac. 984.)

EXECUTION — Confirmation — Action to Set Aside—Right of Action.

One who has filed exceptions to the confirmation of a sale under execution, which have been overruled, cannot thereafter maintain an action to have the order of confirmation set aside on other grounds, without alleging that he had no knowledge or information as to such grounds at the time he filed his exceptions, and without showing that his substantial rights were affected by the order of confirmation.

(Syllabus by Harrison, C.)

Error from District Court, Tulsa County;
L. M. Poe, Judge.

Action by Sarah E. Walton and Louis F. Walton against W. L. Kennamer, G. S. Kemble, W. M. McCullough, and John M. Durell to set aside an order confirming sale under execution. Judgment for defendants, and plaintiffs bring error. Dismissed.

See, also, 39 Okla. 629, 136 Pac. 584.

Baker, Pursel, Gavin & Leith and *C. A. Mountjoy*, for plaintiffs in error.

Hulette F. Aby and *William F. Tucker*, for defendants in error.

Opinion by HARRISON, C. This was an action begun by motion of plaintiffs in error to set aside an order confirming a

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sale under execution. In another action judgment had been rendered against Sarah E. Walton, and execution issued on such judgment.

Certain town lots had been levied upon and sold under such execution. W. M. McCullough, as sheriff of Tulsa county, sold the property, and John M. Durell purchased it at the execution sale. The other defendants here were the plaintiffs in the other suit. The sale having been made and duly recorded by the sheriff, a hearing was had upon the confirmation of such sale upon motion of plaintiffs in the other action to confirm same, and upon objections by plaintiffs in error here to the confirmation of same. And, after a full hearing upon the report of the sheriff as to his acts in the premises, and upon the objections of plaintiffs in error here to the confirmation thereof, the sale was confirmed. Subsequent to the confirmation of the sale and entering of final judgment thereon, plaintiffs in error filed a new motion to set aside the order of confirmation, setting up all the grounds set forth in their original objections to the confirmation of the sale, and, as an additional ground for setting aside the order of confirmation, set up that the purchaser at such sale, John M. Durell, was a deputy under Sheriff McCullough, and that therefore, under section 5987, Comp. Laws 1909 (Rev. Laws 1910, sec. 5171), the sheriff's deed to Durell was void. A hearing was had upon such motion, and the motion denied. Whereupon the movants, Waltons, appeal to this court from the order overruling their latter motion to set aside the order of confirmation. Only one proposition is urged and one ground relied upon by plaintiffs in error, to wit: Whether a deputy sheriff is authorized to purchase property sold under execution by the sheriff.

It might be observed in this connection that this is the only question that plaintiffs in error could urge on this appeal, for the reason that all the other grounds were presented and passed upon in the former objections to the confirmation of sale and no appeal taken therefrom. Hence the setting up of the same grounds in the motion after final judgment would be of no avail to plaintiffs. And, from the record before us, it is unnecessary to pass upon the validity of the sheriff's deed to Durell, nor upon the ques-

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tion whether, under different circumstances, an appeal under section 6058, Comp. Laws 1909 (Rev. Laws 1910, sec. 5310), would lie from the order complained of. The only question which we may properly consider here is whether or not, under the record in this case, the plaintiffs in error should be heard to complain of the validity of the sheriff's deed. It appears from the record that no reason whatever is given for failure to set up this ground in the first motion and objections to the confirmation of sale. It is not shown that plaintiffs were in any way deceived or defrauded, nor that knowledge that the purchaser was a deputy sheriff had come to them after final judgment. It appears to have been an afterthought picked up and relied upon after the judgment and confirmation was finally rendered. Neither is it shown that plaintiffs have any substantial rights in the premises, nor that their substantial rights are affected either by the validity or invalidity of the deed in question. The record shows the property to have been sold to satisfy a judgment against Sarah E. Walton, by which she was foreclosed of all her rights in or to the premises, and of which she makes no complaint in her motion. We are unable to see, therefore, wherein her substantial rights are affected, whether Durell holds a valid deed or not.

On the first feature it was held, in *Fishback v. Columbia Bldg. Ass'n* (Ky.) 47 S. W. 575, a case involving the identical question, that:

"One who has filed exceptions to a report of sale, which have been overruled, cannot thereafter maintain an action to have the sale set aside on other grounds, without alleging that he had no knowledge or information as to such grounds at the time he filed his exceptions."

And, as to the latter phase, in *Foote v. Lathrop*, 41 N. Y. 358, wherein the identical question of appellate procedure was involved, the court held that the order was final, and that no appeal would lie therefrom, for the reason that the movant had failed to show wherein her substantial rights were affected in the premises, concluding:

"Hence it follows that by substantial right is to be understood such rights only as are to be determined as pure questions of law; such only as can be demanded as the strict legal

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right of the party. This view, applied to the present case, requires the appellant to show that she had an absolute right to have the judgment set aside as to her."

The above decisions pass squarely upon the two questions presented here, and, we think, correctly state the law as affecting plaintiff's right of appeal under circumstances like those disclosed by the record in the case at bar.

The appeal should therefore be dismissed.

By the Court: It is so ordered.

BILBY *et al.* v. GILLILAND.

No. 3315. Opinion Filed December 20, 1913.

(137 Pac. 687.)

On Rehearing March 24, 1914.

(139 Pac. 988.)

INDIANS—Allotment—Right to Alienate. "Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of Act of Congress approved June 28, 1898, entitled, 'An Act for the protection of the people of the Indian Territory and for other purposes' (30 St. at L. 495, c. 517), died subsequent to the 1st day of April, 1899, but before having received the allotment of lands to which he was entitled as a member of said tribe of Indians, said lands, by reason of section 28 of the Original Treaty with the Creek Tribe of Indians (Act March 1, 1901, c. 676, 31 St. at L. 861), descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians (Act June 30, 1902, c. 1323, 32 St. at L. 500), and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee-simple title thereto"—following **Deming Inv. Co. v. Bruner Oil Co.**, 35 Okla. 395, 130 Pac. 1157.

(Syllabus by Harrison, C.)

*Error from District Court, Hughes County;
John Caruthers, Judge.*

Action by John W. Gilliland against Nicholas V. Bilby and others to quiet title. Judgment for plaintiff, and defendants bring error. Reversed.

Opinion of the Court.

Lewis C. Lawson, for plaintiffs in error.

Warren & Miller, for defendant in error.

Opinion by HARRISON, C. This was an action by John W. Gilliland against Nicholas V. Bilby, John S. Bilby, and Indian Land & Trust Company to quiet title to the S. W. $\frac{1}{4}$ of section 5, township 6 north, range 9 east. The land in question had fallen to the heirs of a deceased member of the Creek Tribe of Indians whose name had been placed upon the rolls as a full-blood but who had died before receiving his allotments.

The plaintiff alleged that he was the legal and equitable owner of the land in question, but did not disclose his chain of title, but did allege that defendant Nicholas V. Bilby claimed an interest in said land by virtue of a warranty deed from the heirs of the deceased, and that defendant John S. Bilby claimed an interest by virtue of a lease for a period of 99 years which had been executed by Nicholas V. Bilby to the Indian Land & Trust Company and by the trustee of said Land & Trust Company assigned to John S. Bilby, and that such conveyances constituted a cloud on his title, which he prayed to have removed. Defendants Nicholas V. and John S. Bilby filed separate demurrers and, same being overruled, filed separate answers to plaintiff's petition; Nicholas V. Bilby setting up his chain of title.

The cause was tried in April, 1911, and judgment rendered in favor of plaintiff, Gilliland, decreeing title to the land in question in said Gilliland and ordering the deeds through which Nicholas V. Bilby claimed to be canceled and held for naught and the lease through which John S. Bilby claimed to be canceled also. From such judgment plaintiffs in error appeal to this court.

The material facts in the case are: That Little Peter, a full-blood Creek Indian, died in 1899; that his name had been placed on the rolls of such Tribe, but that at the time of his death he had not received his allotment; that after his death, under the provisions of the Original and Supplemental Treaty with the Creek Indians, an allotment which could have been selected by deceased, had he lived, was allotted to his heirs, who were Jennie,

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Millie, Sallie, and Louis Peters; that on August 15, 1904, the heirs of Little Peter, who were then adults, executed a deed of conveyance of said land to Nicholas V. Bilby, which deed was duly recorded August 24, 1904, pursuant to which he went into possession of the land, made substantial and valuable improvements thereon, and remained in exclusive and undisturbed possession of same in person and through tenants, receiving all the rents and profits therefrom and exercising complete control over same up to the time this controversy arose. The further facts appear that in October, 1908, one J. O. Chapman procured a deed of conveyance from the same heirs to the same land and in January, 1910, executed a quitclaim deed to said land to the plaintiff, John W. Gilliland. It also appears that the deed from the heirs of Little Peter to J. O. Chapman was approved by the county judge of Hughes county.

While plaintiffs in error present and argue at great length each of twelve separate assignments of error occurring during the trial of the cause, the question whether Nicholas V. Bilby held a valid title is, under the record, the only question that it is necessary to decide. If his deed was valid, it is unnecessary to determine whether or not Chapman's deed would have been valid had none ever been made by the heirs to Bilby. We will therefore consider the validity of Bilby's deed. In considering this, however, let it be borne in mind that the father of these heirs died before the allotment was taken, and that after his death an allotment which, under the treaty, could have been taken by him, had he lived, was taken by his heirs. The question then is whether such allotment, coming to his heirs in this wise, could be alienated or conveyed by them in August, 1904. This identical question with reference to a full-blood Choctaw Indian was before this court in the case of *Hancock v. Mutual Trust Co.*, 24 Okla. 391, 103 Pac. 566, in which case the syllabus is as follows:

"Lands allotted (homestead and surplus) under the provisions of section 22, c. 1362, 32 St. at L. 641, approved July 1, 1902, in the name of a deceased member of the Choctaw Tribe of Indians, are alienable by his heirs after lawful selection, prior to the lapse of one, three, or five years, and prior to the issuance of certificate or patent."

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In the body of the opinion, *supra*, this court, speaking through Mr. Justice Dunn, after discussing the provisions of section 12 of the treaty between the United States and the Choctaws and Chickasaws, said:

“So that to our minds, from the language, it is clear that if the member, with his designated homestead, lived so long as 21 years from the date of the certificate, during that period he cannot lawfully sell this portion of his allotment; but to us it appears equally clear that, should he die even the next day after receiving his certificate to his homestead allotment, his heirs then (so far as this act is concerned) might sell the same free from any restriction on its alienation. * * * Now, if the heirs of a member of the tribe, as to his homestead, and the heirs of a freedman, may sell the lands allotted to their ancestor, immediately on his death, what possible reason can be assigned, or where is the language in the act which would preclude an immediate alienation by the heirs of those ‘persons’ (which word includes members, citizens, and freedmen) provided for under section 22, who never in fact selected their allotment, but whose allotments were selected solely for the benefit of and in the interest of the heirs? To our minds both are wholly wanting. Nor in our judgment is this restriction in any wise modified or limited by the terms of sections 15 and 16. To our minds it is reasonable to say and hold that lands or other property coming to an individual either by descent or purchase come to him with no restriction upon his rights to dispose of them, except the specific restriction with which their title is by clear terms burdened. This rule, we think, is applicable to the lands which were granted to these people under this treaty. If there is no specific language fixing a restriction, and no language from which an implication thereof may be plainly derived, then, in our judgment, none ought to be held to exist.”

In the case of *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 835, the same question was before the United States Supreme Court, involving the validity of conveyance made by Choctaw heirs of an allotment selected after the death of the parent and before patent had issued, in which case the United States Supreme Court, speaking through Mr. Justice Hughes in reference to an allotment of this character, said:

“The heirs of a deceased Indian allottee under the Supplemental Agreement of July 1, 1902, with the Choctaws and Chicka-

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saws, have a complete equitable interest which, in the absence of restrictions, they may convey before patent"—the court further holding that conveyances by heirs of allotments of this character were valid. The court, however, in discussing the questions involved in the Choctaw case and their right to convey allotments under the conditions above referred to, compares the similar provisions pertaining to the Creeks, saying:

"It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member and 'descent to his heirs.' This, however, is a mere formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead. We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting the homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases, so as to make it applicable to all the lands taken by the heirs, and there is no occasion, or authority for creating a division of the lands so as to impose a restriction upon a part of them. There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyance."

It is evident from the opinion, *supra*, that the court makes the comparison of the provisions of the Choctaw and Chickasaw Agreement with the provisions of the treaty with the Creek Tribe

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pertaining to lands inherited in this wise, for the reason that the court believed that the construction placed on the provisions of the Creek Treaty by the Attorney General's department, the Assistant Attorney General's letter to the Secretary of the Interior being quoted in the opinion, and the construction placed thereon by the Commissioners to the Five Tribes and by the Department of the Interior, was correct, and, seeing no substantial difference between the provisions of the Creek Treaty and those of the Choctaw and Chickasaws, that therefore there should be no restriction, and was none as to the alienation of lands descending to the Choctaws and Chickasaws in this wise.

And following this conclusion in the case of *Reed v. Welty*, 197 Fed. 419, the United States District Court for the Eastern District of Oklahoma, in opinion rendered June 26, 1912, where the question involved was whether London and Ramsey Knight, full-blood Creek citizens who took as heirs of their father and mother who were entitled to allotments but died before taking same, could validly convey their interest in the land as they attempted to do by warranty deed dated July 26, 1904. The court, in an opinion rendered by Campbell, District Judge, quotes at length from the opinion of Mr. Justice Hughes in the Mullen case, *supra*, and concludes as follows:

"By section 20 of the Supplemental Agreement it appears that it was intended to modify and supplement the Original Agreement and repeal any conflicting provision in that agreement or any prior agreement, treaty, or law. So that, if the land was allotted to these heirs before the taking effect of the Supplemental Agreement, then their rights are fixed by the Original Agreement; if afterward, then, so far as the inquiry here is concerned, their rights are fixed by the Original Agreement as amended by section 16 of the Supplemental Agreement above quoted. The bill, however, while not giving the date of the allotment, alleges that the lands passed to the heirs under and by virtue of the Original Creek Agreement. Does the provision of section 7 of the Original Agreement, or of section 16 of the Supplemental Agreement, that the lands allotted to citizens shall not be alienable by the allottee or his heirs for the period of five years, apply to lands of the character involved in this case, or is that restriction to be confined in its application to lands allotted direct to living members and not to the lands allotted to heirs

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of deceased members? In the Choctaw-Chickasaw Agreement, after providing for allotments to living members and for the selection of homesteads by them, inalienable for life, not exceeding 21 years, section 16 provided a term of restrictions upon the sale of lands other than homesteads allotted to members. Then section 22 provided that the lands of any member dying before receiving his allotment should be allotted in his name and should descend to his heirs according to the Arkansas law. Justice Hughes decides that in such case there is no warrant of law for selecting a homestead out of such an allotment. He further decides that the Choctaw-Chickasaw Agreement contemplated two classes of allotments: (1) Allotments to members of the tribes and to freedmen living at the time of the allotment; and (2) allotments made in the case of enrolled members entitled to allotment but dying before actual allotment had been made, and that the restriction prescribed in section 16 applies to the former and not to the latter. In the Creek Agreement the Commission is dealing with another one of the Five Tribes, but with the same object in view, that of the allotment of the tribal lands to the individual member, and the agreement is so similar to the Choctaw-Chickasaw Agreement in terms and arrangement that the two classifications of allotments found by Justice Hughes in the latter agreement may also be said to exist in the former, and, as in the Choctaw-Chickasaw Agreement, the restrictions upon alienation must be held to have only applied to the first class; that is, allotments to members of the tribe living at the time of allotment. It follows that on July 26, 1904, London and Ramsey Knight had an alienable interest in the land in question. * * *

To the same effect is *Rentie v. McCoy*, 35 Okla. 77, 128 Pac. 244, which was a Creek allotment, the facts in which case are stated in the syllabus as follows:

"Scott Rentie, a minor, and a duly enrolled Creek freedman, died July 2, 1899, without a surviving widow or children; his allotment not then having been selected. On August 15, 1902, his distributive share of land, as a member of said tribe, was allotted to his heirs. On April 8, 1905, Morris and Katie Rentie, who were the father and mother of Scott Rentie, and his surviving heirs, executed in due form a warranty deed covering said allotment to D. On May 25, 1905, D. conveyed by warranty deed to E. M., who then and there took possession of said premises and remained in possession until he conveyed to H. M., to whom he surrendered possession. H. M. continued in possession until 1909, when an ejectment action was brought for possession.

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Held: (a) That said land passed to Morris and Katie Rentie free from restrictions. (b) That said land was alienable on April 8, 1905, when Morris and Katie Rentie conveyed to D."

Also in *Deming Inv. Co. v. Bruner Oil Co.*, 35 Okla. 395, 130 Pac. 1157; the facts being stated in the syllabus as follows:

"Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of Act of Congress approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory and for other purposes' [30 St. at L. 495, c. 517], died subsequent to the 1st day of April, 1899, but before having received the allotment of lands to which he was entitled as a member of said tribe of Indians, said lands, by reason of section 28 of the Original Treaty with the Creek Tribe of Indians [Act March 1, 1901, c. 676, 31 St. at L. 861], descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians [Act June 30, 1902, c. 1323, 32 St. at L. 500], and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee-simple title thereto."

We deem it unnecessary to cite further authorities, as the question is well settled in this court that in the case of a full-blood Creek Indian who was entitled to enrollment but died after April 1, 1899, after he had been enrolled but before receiving his allotment, his heirs took such allotment free from restrictions as to alienation and on August 15, 1904, could convey valid title to same.

It follows, therefore, that if Little Peter died in the latter part of 1889, after having been enrolled, but before taking his allotment, that the allotment which he could have taken had he lived passed to his heirs, and that the deed executed August 15, 1904, by such heirs, conveying said allotment to Nicholas V. Bilby, was a valid deed and conveyed all the title which said heirs had in said land, and that therefore the deed executed by said heirs on October 31, 1908, pretending to convey said land to J. O. Chapman, was void and of no effect for the reason that at that time said heirs had no title in said land, having conveyed all their title to Nicholas V. Bilby on August 15, 1904. This being true, it follows that the lease through which John S. Bilby claimed was valid, and that John S. Bilby was entitled to posses-

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sion of said premises as against any and all parties claiming under or through defendant in error, John W. Gilliland.

Hence the judgment of the lower court must be reversed, with instructions to render judgment in accord with this decision.

By the Court: It is so ordered.

ON REHEARING.

PER CURIAM. After careful consideration of the points urged by defendant in error for rehearing, and a careful re-reading of the record, we find that the propositions urged in the petition for rehearing are not well taken.

We further find, as disclosed by the record, that the quitclaim deed from John O. Chapman to John W. Gilliland, upon which Gilliland relies for recovery in this action, was executed and delivered January 17, 1910, and that, at the time this quitclaim deed was executed and delivered, R. V. Bilby, through his tenants, was then in possession and absolute control of the premises in question, and that Gilliland, through his tenants, made no pretensions to get possession of such premises until November or December, 1910, after the crops for that year had been gathered and Bilby had received the rents and profits; that even then he obtained possession under questionable means.

We further find from the record that under Gilliland's own testimony he knew, at the time he took the quitclaim deed from Chapman, that Bilby had a deed from the heirs of Little Peter on record. On page 49 of the record he says:

"Q. Didn't you know he had a deed on that land and was claiming it? A. I knew he had an old void deed on it; yes, sir."

On further cross-examination (page 50) he says:

"Q. You understood he had a deed from all the other heirs? A. I saw the deed on record. Q. You saw this deed that I now hand you on record (handing witness paper)? A. I saw the deed that is the copy of; yes, sir. Q. You saw that before you purchased the land, didn't you? A. Certainly. * * * Q. You never had any agreement or understanding with Mr. Bilby by which you was to get in possession of these lands, did you? A.

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I did not. Q. Did you receive any rents for these lands for the year 1910? A. No, sir."

Hence, under Gilliland's own testimony, he took the quit-claim deed from Chapman at a time when Bilby was in full possession and complete control of the premises in question, and had been for a period of more than five years, under a duly recorded deed from the heirs of Little Peter, during which time neither the heirs nor Chapman had received any of the rents and profits from said premises, nor pretended to lay any claim to same or exercise any control over same. Therefore, under the authority of *Miller v. Fryer*, 35 Okla. 145, 128 Pac. 713, opinion by Justice Hayes, the syllabus of which is as follows:

"By reason of section 2215, Comp. Laws 1909 [Rev. Laws 1910, sec. 2260], a deed conveying real estate, executed by a grantor at a time when he was not in possession of the conveyed premises, is void as between the grantee and a person who was at the time of the conveyance in adverse possession of the conveyed premises; and this rule applies where the grantor is an allottee of the Chickasaw and Choctaw Tribes of Indians upon whose power to alienate his allotment the restrictions have been removed prior to the time of the execution of the deed, and where the person in possession originally obtained possession and claims title to the conveyed premises by virtue of a void deed executed by the allottee before the removal of restrictions upon his power to alienate his allotted lands"

—and also *Ruby v. Nunn*, 37 Okla. 389, 132 Pac. 128, opinion by Brewer, C., the syllabus of which is as follows:

"By reason of section 2215, Comp. Laws 1909 [Rev. Laws 1910, sec. 2260], a deed conveying real estate, executed by a grantor at the time not in possession of the conveyed premises, is void as between the grantee and a person who was at the time of the conveyance in adverse possession of the conveyed premises; and this rule applies where the grantor is an allottee of the Creek Tribe of Indians, upon whose power to alienate his allotment the restrictions have been removed prior to the time of the execution of the deed, and where the person in possession originally obtained possession and claimed title to the conveyed premises by virtue of a void deed executed by the allottee before the removal of restrictions upon his power to alienate his allotted lands"

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—the deed from Chapman to Gilliland was champertous and void as between Gilliland and Bilby.

The former opinion, therefore, with this addition, is adhered to.

By the Court: It is so ordered.

FLAMM v. WINELAND *et al.*

No. 3550. Opinion Filed March 24, 1914.

(139 Pac. 981.)

1. **MALICIOUS PROSECUTION—Cause of Action—Essentials.** The elements entering into and necessary to be shown in a suit for damages for malicious prosecution are: (1) That a prosecution was commenced against plaintiff; (2) that it was instituted or instigated by defendant; (3) that it was malicious; (4) that it has been legally and finally terminated in plaintiff's favor; (5) that it was without probable cause.
2. **MALICIOUS PROSECUTION—Sufficiency of Evidence.** The evidence in the trial court fails to make a case (1) on the question of the final determination of the criminal prosecution in plaintiff's favor; (2) in failing to show that defendants instituted or instigated the criminal prosecution against plaintiff in the manner alleged.
3. **TRIAL—Direction of Verdict—Evidence.** The court did not err in directing a verdict in favor of defendants.

(Syllabus by Brewer, C.)

Error from Superior Court, Muskogee County;
Farrar L. McCain, Judge.

Action by L. F. Flamm against H. L. Wineland and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Earl Bohannon, S. V. O'Hare, and Robertson & Kean, for plaintiff in error.

W. C. Franklin and P. J. Carey, for defendants in error.

Opinion by BREWER, C. L. F. Flamm filed suit in the superior court of Muskogee county against H. L. Wineland and

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A. R. Skidmore as defendants on the grounds of an alleged malicious prosecution. The basis of the suit is contained in the following allegation found in the petition:

"That on or about the 6th day of January, 1910, in the county of Muskogee, state of Oklahoma, the above-named defendants maliciously, unlawfully, and without any probable cause, did cause the plaintiff to be indicted by a grand jury of Muskogee county on a charge to cheat and defraud the county of Muskogee; that said indictment was caused by the fact that these defendants, acting in concert, and for the purpose of causing this plaintiff to be indicted by the said grand jury, did maliciously and fraudulently induce certain witnesses to appear and testify before the said grand jury, and did falsely and fraudulently induce the said witnesses to testify to such statements as would cause the grand jury to indict this plaintiff; * * * and that they induced the said witnesses to refrain from telling the grand jury all the facts in connection with the transaction concerning which this plaintiff was indicted, but induced them to testify only to such statements as would cause the grand jury to indict this plaintiff."

After the plaintiff had introduced his evidence and rested, the court sustained a demurrer thereto, as being insufficient to make out a case, and entered a judgment in favor of the defendants that they go hence, with their costs.

A consideration of the action of the court in sustaining defendants' demurrer to the evidence is all that is necessary, in our judgment, for the proper determination of this case, and, from a careful examination of all the evidence as abstracted in the various briefs, we have no hesitation in saying that the court was right.

The elements entering into, and necessary to be shown, in a suit for damages growing out of an alleged malicious prosecution are: (1) That a prosecution was commenced against plaintiff; (2) that it was instituted or instigated by the defendant; (3) that it was malicious; (4) that it has been legally and finally terminated in plaintiff's favor; (5) that it was without probable cause. *C., R. I. & P. Ry. Co. v. Holliday*, 30 Okla. 680, 120 Pac. 927, 39 L. R. A. (N. S.) 205; *Schricber v. Clapp*, 13 Okla. 215, 74 Pac. 316; *Sawyer v. Shick et al.*, 30 Okla. 354, 120 Pac. 581.

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We think the evidence fails to make out a case (1) on the question of the final determination of the criminal prosecution in plaintiff's favor; (2) in failing to show that the defendants instituted or instigated the criminal prosecution against plaintiff in the manner alleged.

The evidence in this case shows that the plaintiff was indicted by a grand jury impaneled by the district court of Muskogee county; that he was arrested and gave bond in said court; that an order of removal was obtained therein to the superior court of Muskogee county; the order and papers in the case show that it was styled the case of the State of Oklahoma against L. F. Flamm and A. J. Austin, alias A. J. Alston, No. 437. The evidence offered to show that the suit had been finally terminated was a journal entry of the superior court in a case styled State of Oklahoma v. L. F. Flamm *et al.*, No. 508, Criminal, which merely recited that on a certain date the cause was dismissed at the cost of the state, and the defendant discharged. There is no other proof on this question. There is nothing in or indorsed on the papers offered in evidence, nor in the oral proof, which shows any connection between the case alleged to have been maliciously prosecuted and the one shown to have been dismissed in the superior court, except that L. F. Flamm is a defendant in both cases.

Of course it may be true, and probably is true as a matter of fact, that after the original criminal action was transferred to the superior court it was given a new number, and we would be inclined to overlook this matter were it not for the fact that when this journal entry was offered in evidence, after an objection to it by the defendants on general grounds, the specific objection was pointed out that the journal entry proposed as evidence showed no connection with the cause upon which this suit was founded.

But, aside from this, to our minds the evidence fails to support the allegations of the petition, which we have set out above, and which were necessary to be supported to show liability. The specific wrongdoing charged against the defendants is that they "did maliciously and fraudulently induce certain witnesses to appear and testify before the said grand jury, and did falsely

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and fraudulently induce the said witnesses to testify to such statement as would cause the grand jury to indict this plaintiff. * * * and that they induced the said witness to refrain from telling the grand jury all the facts in connection with the transaction," etc.

If they did this, it was actionable; however, there is no proof to support these allegations. It is not shown that the defendants, or either of them, were before the grand jury, nor that they procured any witness to testify falsely before the grand jury, nor that any witness did so testify falsely before the grand jury, nor was there any proof, or any attempt to show, that any witness testifying before the grand jury withheld any facts from it, or that either of the defendants tried to get any witness to withhold any facts from the grand jury.

About all the proof that is made in this case, and which might affect defendants, is that they did not like the plaintiff, and had upon different occasions used expressions that manifested this ill feeling towards him; that these defendants, assisted by other citizens of the community, circulated and signed the petition necessary to warrant the district judge in calling a special grand jury to be impaneled to investigate, among other things, the conduct of certain county officials, and that as a result of such grand jury investigation certain county officials were suspended or removed from office, and the present plaintiff failed to be reappointed as county physician, and was also indicted for obtaining money from the county under false and fraudulent pretenses. The record does not show, and we cannot take judicial notice of newspaper accounts, as to just how much trouble this grand jury caused in that county; but it certainly did not confine its operations and could not have been petitioned by the citizens for the purpose of venting anybody's ill will against this particular defendant. If a citizen subjects himself to a suit for damages at the hands of every one he may dislike in a county, when he signs a petition for a special grand jury, or even takes steps towards circulating such petition, we apprehend that it will be difficult in the future to have such grand jury convene, regardless of how necessary it may be under the local conditions prevailing.

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Other phases of the case need no discussion in view of the above holding.

The cause should be affirmed.

By the Court: It is so ordered.

PRIBOTH v. HAVERON.

No. 3601. Opinion Filed March 24, 1914.

(139 Pac. 973.)

1. **RAPE—Civil Liability.** Rape of a female gives her a cause of action for damages against the perpetrator.
2. **SAME—Right of Action.** A civil action to recover damages for an assault may be maintained by or in behalf of a female under the age of sixteen years, where the assault upon her is committed in such manner and under such circumstances as to constitute statutory rape.
3. **SAME.** A female under the age of sixteen years is incapable of consenting to sexual intercourse, and sexual intercourse with such person, with or without her consent, constitutes rape, under section 2414, Rev. Laws 1910.

(Syllabus by Galbraith, C.)

Error from District Court, Tillman County;
J. T. Johnson, Judge.

Action by Oma Agnes Haveron, by her father and next friend, M. H. Haveron, against A. F. Priboth. Judgment was for the plaintiff, and the defendant brings error. Affirmed.

John S. Burger, for plaintiff in error.

Mounts & Davis and *Gray & McVay*, for defendant in error.

Opinion by GALBRAITH, C. Oma Agnes Haveron, by her father and next friend, commenced this action in the district court of Tillman county against A. F. Priboth to recover damages for a felonious assault alleged to have been committed against her person. The defendant filed a general denial. There was a trial before the court and a jury, and verdict returned for the

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plaintiff for the sum of \$1,375. From the judgment rendered upon this verdict, the defendant perfected an appeal to this court by petition in error and case-made.

While there are some eighteen assignments of error set out in the petition in error, but one question is seriously argued in the brief, and this, as stated in the brief of counsel for plaintiff in error, is as follows:

“We have presented but one question to this court, which is materially raised by the record, and that is that, in the state of Oklahoma, a woman cannot maintain an action in her own name, or in the name of any one else for the use and benefit, for her seduction.”

The other assignments set out in the petition in error are waived by the failure of counsel to urge them in his brief. It is only necessary for us to consider this one question in deciding this case. This question was raised first by a demurrer to the petition, and again by an objection to the introduction of testimony at the commencement of the trial, and again by a demurrer to the evidence at the close of plaintiff's evidence.

The gravamen of the charge is set out in the third paragraph of the petition. It having been alleged in a preceding paragraph that the plaintiff was not the wife of the defendant, and that her sixteenth birthday occurred on the 28th day of March, 1909, this paragraph charges:

“The plaintiff further states that, prior to the 28th day of April, the said defendant, about the 1st day of March, 1909, and on various times before and after that time, and prior to the 28th day of April, 1909, well knowing that the said Oma Agnes Haveron was a young girl, and of that age that did not permit or allow her to know the seriousness of the act, and know the consequences thereof, did willfully, unlawfully, and maliciously seduce, debauch, and carnally know the said Oma Agnes Haveron, and that, by reason of the premises, the said Oma Agnes Haveron did become pregnant and sick with child, and so remained until about the 6th day of December, 1909, at which time said child was born, and is now living and being maintained and supported by plaintiff and her father.”

These allegations are fully sustained by the testimony of the plaintiff; in fact, they are not denied. The defendant was not present at the trial, and did not testify. The case was submit-

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ted to the jury by the court on the theory that, if the defendant had sexual intercourse with the plaintiff, and she became pregnant, and afterwards gave birth to a child, being under sixteen years of age, and not being the wife of the defendant, she was entitled to recover, and it further announced the proper rule for measuring the damages she had sustained, should they find for the plaintiff.

The plaintiff in error is wrong in his contention as to the law. The petition did state facts sufficient to constitute a cause of action, and the evidence fully supported the allegations of the petition.

The law is settled in this state that a civil action for damages for statutory rape may be maintained. In the case of *Watson v. Taylor*, 35 Okla. 768, at page 774, 131 Pac. 922, at page 925, the court said:

"Moreover, our statute provides (section 2353, Comp. Laws 1909 [Rev. Laws 1910, sec. 2414]) that all that is required to constitute the crime of rape is an 'act of sexual intercourse accomplished with a female, not the wife of the perpetrator. *** Where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character.' The language of the statute is clear and unambiguous. It clearly eliminates the elements of consent and resistance from the case of an assault upon the class of females therein described. Its manifest purpose is to throw a protecting mantle about the female children of this state within certain ages, which the hand of the libertine may not withdraw except at his peril. The statute, in effect, says that chastity is such a precious gem in the crown of maidenly graces that it cannot be stolen or removed therefrom even with the consent of the wearer, without offending the majesty of the law. To prove that the female consented will not mollify the statute; neither should it avail as a defense to a civil action for damages for an assault upon her committed in such manner and under such circumstances as to constitute rape as defined by the statute."

The Criminal Court of Appeals said in the case of *Lee v. State*, 7 Okla. Cr. 141, at page 148, 122 Pac. 1111, at page 1114:

"Carnal knowledge of a female child under sixteen years of age is rape under our statute, with or without the use of force, no matter what may be the circumstances, and the question of consent is wholly immaterial; whether the prosecutrix submitted to the acts of the defendant in ignorance of his criminal intent,

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or whether she exercised a positive will, and consented or submitted to what the defendant did, with full knowledge that his purpose and intent was to have carnal connection with her, is immaterial. The prosecutrix, being under the age of consent, was conclusively incapable of legally consenting to an assault with intent to have carnal knowledge of her. Every attempt to commit a felony against the person involves an assault; and, if the acts of the defendant, done in furtherance of a purpose to have carnal knowledge of the prosecutrix, constituted an assault to commit rape, if done without her consent, then no act of hers could waive such assault. That there may be an assault with intent to commit rape upon a consenting female, where she is under the age of consent, on the ground that in law she cannot consent to such an assault, is held in the following cases: *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *Gibbs v. People*, 36 Colo. 452, 85 Pac. 425; *Territory v. Keyes*, 5 Dak. 244, 38 N. W. 440; *Schang v. State*, 43 Fla. 561, 31 South. 346; *Hanes v. State*, 155 Ind. 112, 57 N. E. 704; *State v. Johnson*, 133 Iowa, 38, 110 N. W. 170; *Com. v. Roosnell*, 143 Mass. 32, 8 N. E. 747; *People v. Chamblin*, 149 Mich. 653, 113 N. W. 27; *State v. Wray*, 109 Mo. 594, 19 S. W. 86; *Liebscher v. State*, 69 Nev. 395, 95 N. W. 870, 5 Ann. Cas. 351; *State v. Jackson*, 65 N. J. Law, 105, 46 Atl. 764; *Singer v. People*, 75 N. Y. 608; *State v. Dancy*, 83 N. C. 608; *State v. Sargent*, 32 Ore. 110, 49 Pac. 889; *Croomes v. State*, 40 Tex. Cr. R. 672, 51 S. W. 924, 53 S. W. 882; *State v. Clark*, 77 Vt. 10, 58 Atl. 796; *Glover v. Commonwealth*, 86 Va. 382, 10 S. E. 420; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *Loose v. State*, 120 Wis. 115, 97 N. W. 526; *Ross v. State*, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217; Cyc. vol. 33, p. 1434, footnote 51. See, also, volume 2, Am. & Eng. Ency. L. (2d Ed.) p. 987, and page 361, vol. 1 of Supp., and cases cited in the footnotes."

Under these authorities, the contention made by the plaintiff in error cannot be sustained, and the assignment argued should be overruled.

After a careful reading of the record in this case, we are convinced that the cause was fairly submitted to the jury, and that the verdict was justified and is amply supported by the evidence, and that the judgment appealed from should be affirmed.

By the Court: It is so ordered.

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CHAMBERS v. KIRK *et al.*

No. 3602. Opinion Filed March 24, 1914.

(139 Pac. 986.)

1. **BANKRUPTCY—Assets—Judgment Lien.** All the property of an individual, not exempt to him under the law, becomes, upon his adjudication as a bankrupt, assets to be administered in the bankruptcy proceedings; and a money judgment rendered in a state court during the pendency of the proceedings does not impose a lien on lands forming a part of such assets.
2. **SAME—Discharge—Effect—False Pretenses—Pleading.** A judgment on account of a liability for obtaining property by false pretenses or false representations is not released by a discharge in bankruptcy; but an allegation in a pleading, answering a claim of discharge, which avers in substance that, at the time the debtor borrowed the money, and gave a note secured by a mortgage, he represented that he was going to invest the money in a farm which would become part of his general assets, and would not be converted into an exempt homestead, does not state a case of obtaining property by false pretenses or false representations, so as to relieve the debt of the effect of the discharge.
3. **EVIDENCE — Parol — Record — Judgment Against Bankrupt.** Where a liability against a bankrupt has been prosecuted to judgment, the record is decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by oral evidence except in case of ambiguity.
4. **PLEADING—Judgment on Pleading—Reply—General Denial.** Although a reply to an answer which sets up a discharge in bankruptcy contains a "general denial of the matters set up in the answer except as thereafter admitted," where the reply then undertakes to allege facts which are intended to avoid the effect of the discharge as to that particular claim, it is in effect an admission of the fact or the order of discharge, coupled with the affirmative defense that the discharge is inoperative against the debt in suit; and, where the affirmative facts set up are insufficient in law to defeat the defense of discharge, it was not error to order judgment on the pleadings, notwithstanding the general denial.

(Syllabus by Brewer, C.)

*Error from District Court, Garfield County;
James B. Cullison, Judge.*

Action by T. S. Chambers against Frank S. Kirk and another. Judgment for defendants on the pleadings, and plaintiff brings error. Affirmed.

Opinion of the Court.

Parker & Simons and Dale & Bierer, for plaintiff in error.

James K. Beauchamp, for defendants in error.

Opinion by BREWER, C. On the 25th day of September, 1903, the defendants in error, who were defendants below, executed a promissory note in favor of the plaintiff in error, and secured the same by a mortgage upon certain lots in the city of Enid. The note was due and payable September 25, 1904. On the 21st day of October, 1903, the defendant Frank S. Kirk was adjudged to be a bankrupt. Suit was filed on the note heretofore mentioned, and to foreclose the mortgage securing the same, and a judgment was rendered thereon upon the 20th day of May, 1905, under which the property mentioned in the mortgage was sold, and the proceeds thereof applied on the judgment, leaving a deficiency judgment against the defendants.

In 1908 the present suit was filed, and the amended petition filed March 18, 1908, recites the former judgment, the sale of the mortgaged property, the application of the proceeds, and the deficiency judgment against the defendants, and then avers that defendant Frank S. Kirk was the owner of a one-third section of land (therein described), and that the deficiency judgment was a lien thereon, and that execution had been issued, but the sheriff had refused to levy same on said land because of the claim made by defendants that it was their homestead and exempt. The petition then avers that the land was not in fact the homestead, but that in truth the homestead claim is invalid, and that the property is therefore subject to the payment of plaintiff's judgment. The prayer of the petition is, in brief, that it be adjudged that plaintiff have a lien on the land, that it is not the homestead of defendants, and that execution be awarded, and the land subjected to the payment of the judgment.

The defendant Frank S. Kirk, for his answer, after averring that plaintiff's judgment had been rendered as alleged, and was based on the promissory note referred to, set up the fact of his having been adjudged a bankrupt on the 21st day of October, 1903, in a court exercising the jurisdiction of a district court of the United States, and that on the 12th day of October, 1909,

the said Frank S. Kirk was, by the United States District Court for the Western District of Oklahoma, duly and legally discharged in bankruptcy, and attached as an exhibit to said answer a certified copy of the order of discharge referred to. Defendant further alleged that during the pendency of his bankruptcy proceedings plaintiff's had been listed by defendant with his other debts, that same had been filed with and allowed by the court, and that plaintiff had received from defendant's estate dividends in the same amount as paid to other creditors.

To this answer, the plaintiff filed a reply, consisting of a general denial of all material allegations of the answer not thereafter expressly admitted, and for further reply alleged, in substance, that his deficiency judgment against defendant was not a liability that could be discharged in bankruptcy, and, as a basis for this claim, alleged that, at the time he loaned the defendant the money, evidenced by the promissory note upon which the judgment was rendered, the defendant represented that he intended to purchase a farm with the money, and that said farm would remain as part of his general assets, which as such would be subject to the payment of plaintiff's note in the event the mortgage security should not be sufficient, and that in loaning the money plaintiff relied upon such representation. Plaintiff then avers that the defendant, in violation of his representation that the land to be purchased would remain a part of his general assets, moved onto said farm, and established thereon his homestead, and that, if plaintiff had known it was the intention of the defendant to create a homestead upon said farm, he would not have loaned him the money.

On January 8, 1912, the court sustained the defendant Frank S. Kirk's motion for judgment on the pleadings, and continued the cause as to the other defendant, who had filed merely a general denial for answer. The plaintiff below brings the case to this court for a review of the action of the court in rendering judgment on the pleadings.

The plaintiff, to sustain the claim that the court committed error, presents his arguments under two propositions: (1) That

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the court was wrong, if for no other reason, because the reply contained a general denial. (2) That the court was wrong for the reason that the discharge in bankruptcy pleaded in the answer did not accomplish a discharge from the indebtedness made the basis for this suit, for the reason that "the liability upon which plaintiff's judgment was based was one for obtaining money by false pretenses, and brought the case within the exception contained in the bankruptcy statutes."

This suit is not to obtain a money judgment against defendants, but for a decree subjecting certain specific property to the payment of a judgment already existing. Therefore it is quite clear that the whole case depends on whether the deficiency judgment of May 20, 1905, left against defendants after applying the proceeds of the mortgage sale, created an enforceable lien on the farm in question. It seems to us that this question is easily answered. If the farm was not a homestead, and for that reason exempt under the state law, on October 21, 1903, when defendant was adjudged bankrupt, the title passed into custody of the law, as assets of the defendant's estate for the benefit of creditors. *State Bank of Chicago v. Cox*, 143 Fed. 92, 74 C. C. A. 285; *In re Pekin Plow Co.*, 112 Fed. 308, 50 C. C. A. 257; *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261; 1 Loveland on Bankruptcy, p. 106; *In re Hughes* (D. C.) 170 Fed. 809. If it was a homestead, and exempt to defendant, it could not be taken in execution to satisfy the judgment. Sections 3342, 3343, Rev. Laws 1910 (sections 1, 2, art. 12, Williams' Ann. Const. Okla.).

It is quite well settled that, if this land was not exempt as a homestead of the bankrupt, it became, upon the adjudication, part of the assets to be administered in the bankruptcy proceedings, and no judgment of the state court had during the pendency of the bankruptcy could be a lien on the land, or in any other wise affect it. *In re Reynolds* (D. C.) 11 Am. Bankr. Rep. 758, 127 Fed. 760; *In re Knight* (D. C.) 11 Am. Bankr. Rep. 1, 125 Fed. 35; *St. Cyr. v. Daignault* (D. C.) 103 Fed. 854; Loveland on Bankruptcy, p. 104 *et seq.*

Plaintiff avers in his petition that it was not a homestead; therefore, being bound by the averment in his own petition, it was assets of the estate in the bankruptcy court, and his judgment was not a lien on the property.

In 2 Loveland on Bankruptcy, p. 1360, the kinds of indebtedness, or rather of liabilities, not released by a discharge is thus stated:

"Since the amendment of 1903 it is immaterial whether or not the claim is in the form of a judgment, as the word 'judgments' has been omitted, and 'liabilities' substituted. If it is a liability for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female, or for criminal conversation, it is not discharged."

We do not think the averments of the reply, intended to show a reason why the discharge in bankruptcy did not apply to the judgment involved here, are sufficient. They will be construed in connection with the other pleadings. We think the deficiency judgment was discharged by the discharge in bankruptcy. It was based on a plain promissory note for borrowed money, secured by property that sold for \$5,000. There is nothing in the judgment, or the proceedings leading up to it, or the note on which it was founded, to indicate that it is such a debt as comes under the exception to the general law that a discharge in bankruptcy discharges the obligation to pay antecedent provable debts.

Where the liability has been prosecuted to judgment, the record is decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by oral evidence except in case of ambiguity. *Peters v. United States*, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206; *Donald v. Kell*, 111 Ind. 1, 11 N. E. 782; *Flanagan v. Pearson*, 42 Tex. 1; *Loveland on Bankruptcy*, p. 1353.

The reply avers that defendant represented that he intended to invest the money he was borrowing in a farm, and that the farm would remain part of his assets subject to plaintiff's claim.

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etc. This is the false pretense which, it is claimed, prevents the debt being discharged in bankruptcy. This does not state a case of obtaining money by false pretenses. It, at most, was merely a promise or statement of intention. It was not a misrepresentation of any existing fact or circumstance.

This leads us to conclude that as shown by the pleadings the judgment of May 20, 1905, was not a lien on the land involved; that the judgment was released as against Frank S. Kirk by the discharge in bankruptcy; that therefore no cause of action is shown; and that the court properly gave judgment on the pleadings. The contention that the judgment cannot stand because there was a general denial in the reply is without merit. The reply does deny matters not thereafter admitted; but the effect of the new matter thereafter pleaded in the reply is to admit the fact of the discharge in bankruptcy, and then to set up a condition which was intended to show that the discharge was ineffectual as against this particular debt. The pleading, then, having the effect of admitting the discharge, and seeking to avoid it, and the discharge being sufficient to release the debtor as a matter of law, in so far as the reasons against it in the reply are concerned, it follows that no fact put in issue by the general denial is material, or would affect the result if tried out. *Adkins v. Arnold*, 32 Okla. 167, 121 Pac. 186.

The cause should be affirmed.

By the Court: It is so ordered.

MISSOURI, O. & G. RY. CO. v. PORTER.

No. 3605. Opinion Filed March 24, 1914.

(139 Pac. 954.)

CARRIERS—Shipment Contract—Limitation of Liability—Validity. A special contract executed between a common carrier and a shipper, in consideration of a lower freight rate, providing that in case of loss or damage to the property the liability of the carrier shall not exceed a maximum valuation per 100 pounds, is not a contract attempting to exempt the carrier from liability on account of its own negligence; and if the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld as a proper and lawful means of determining the amount of the carrier's liability in case of loss.

(Syllabus by Brewer, C.)

*Error from County Court, Hughes County;**P. W. Gardner, Judge.*

Action by Cora Porter against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. R. Jones and J. C. Wilhoit (Alexander New and Arthur Miller of counsel), for plaintiff in error.

Opinion by BREWER, C. The defendant in error, as plaintiff below, sued the defendant railway in a justice of the peace court for damages for the loss of some household goods alleged to have been shipped over defendant's line from Muskogee to Lamar, Okla. Judgment was entered against the railway in the justice court, and it appealed to the county court of Hughes county, where judgment was again rendered against the defendant, and it brings the case here for review on case-made.

At the trial the plaintiff, for the purpose of proving the contract of carriage, introduced in evidence the bill of lading under which the shipment was received and carried. This contract, among other provisions, contained the following:

"1 B & H H Goods 200 Rel. Val. \$5.00 C.W.T. In case L or D Prepaid Paid Jan. 3, 1910 C. R. Kelly by Jones, Missouri, Oklahoma & Gulf R. R. Co."

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These terms were explained by plaintiff's witness to mean.

"One box household goods, weighing 200 pounds at owner's risk; released value \$5.00 on the hundred weight in case of loss or damage."

At the conclusion of all the evidence the defendant requested the court to give to the jury the following instruction:

"You are instructed that, under and by virtue of the terms of the written contract introduced in evidence herein, the plaintiff can only recover, if she is entitled to recover anything, the sum of \$10, or \$5 per cwt., for the 200 pounds, the weight of the shipment."

This instruction was refused by the court, and the following given as the measure of damages:

"If you should, from the evidence, conclude that it is your duty to find for plaintiff for the alleged loss of the goods, or any of the goods alleged to be included in said shipment, you are instructed that the measure of damages by which you are to be governed in estimating the damages of plaintiff herein is the market value of the goods alleged and found by you to have been lost in the city of Muskogee, Okla., at the time same were delivered to defendant for shipment."

The court erred. The contract of carriage relied on by plaintiff, and proven by her, provided for a release of value down to \$5 per 100 pounds. This provision has been upheld by the courts as reasonable. This court, following the clear weight of authorities, has held that a special contract executed between a carrier and shipper, in consideration of a lower freight rate, providing that in case of total loss of the property the liability of the carrier shall not exceed a maximum valuation per 100 pounds, is not a contract attempting to exempt the carrier from liability on account of its own negligence; and if the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld as a proper and lawful means of determining the amount of the carrier's liability in case of total loss. *St. L. & S. F. R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104; *Patterson v. M., K. & T. Ry. Co.*, 24 Okla. 747, 104 Pac. 31; *M., K. & T. Ry. Co. v. Davis*, 24 Okla. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866; *St. L. & S. F. R. Co. v. Cake*, 25 Okla. 227, 105 Pac. 322; *C., R. I. & P. Ry. Co. v. Wehrman*, 25 Okla.

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. 147, 105 Pac. 328; *M., K. & T. Ry. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220; *M., K. & T. Ry. Co. v. Hancock & Goodbar*, 26 Okla. 265, 109 Pac. 223; *Midland Valley R. Co. v. Ezell*, 29 Okla. 40, 116 Pac. 163; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and cases cited; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

The general ground upon which the shipper is limited to the valuation he has declared or agreed upon is that of estoppel, which is based upon the supposition that the particular valuation was made for the purpose of attaining the lower of two available rates based on valuation. *M., K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690. In this case the plaintiff introduced and relies upon the contract in which the released value provision is found, and no complaint is made that it is either unreasonable or unjust, or was not fairly entered into. *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

The cause should be reversed and remanded for a new trial.
By the Court: It is so ordered.

COX v. KIRKWOOD *et al.*

No. 3609. Opinion Filed March 24, 1914.

(139 Pac. 980.)

CONTINUANCE—Grounds—Discretion. When a case is called for trial, and plaintiff's application to dismiss without prejudice and at his expense is denied, and counsel then presents an application for a continuance, supported by his affidavit, on account of the absence of the plaintiff, who is a resident of a distant state, and an important witness in the case, setting out competent and relevant testimony which the plaintiff would give if present, and alleging that he is not present because counsel advised him that the case would be dismissed, and it was not necessary for him to incur the expense of coming to the place of trial, and the continuance is denied, **held**, that the denial of the continuance was an abuse of discretion, particularly where an examination of the record discloses that the plaintiff did not have a fair trial in his absence.

(Syllabus by Galbraith, C.)

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*Error from County Court, Cherokee County;
J. F. Parks, Judge.*

Action by J. F. Cox against J. T. Kirkwood and twelve others. Judgment was for the defendants, and plaintiff brings error. Reversed.

Wm. A. Green and W. D. Halfhill, for plaintiff in error.

J. I. Coursey, for defendants in error.

Opinion by GALBRAITH, C. The plaintiff in error commenced this action against J. T. Kirkwood and twelve others to recover \$675, balance due on a promissory note dated November 4, 1908, due November 1, 1909, payable to the order of Edward T. Philpot, or bearer, alleging that he purchased said note prior to maturity for value and in due course of business, and that he was the legal holder thereof, and that the same was past due and unpaid, and praying for judgment. The defendants filed an amended answer in which they denied execution of the note, and also denied that they had made any payment on the same, and further admitted their signature to the note, but claimed that it had been materially changed and altered after its execution, and without their knowledge or consent, and that such changes were material, and in fact changed the note from a nonnegotiable to a negotiable one, and set out the changes made in the note, and further alleged that they had a perfect defense to the note in the hands of the payee, and that there was a failure of consideration in said note, and that there was an oral agreement between the defendants and the payee's agent at the time of the execution of the note (setting out the terms of this contract), and that the same had not been complied with by the payee; also alleging that the plaintiff was not a *bona fide* holder of the note for value. The prayer was that the plaintiff take nothing, and that the court cancel the note because of the alleged alteration and forgery, and for judgment for costs. The cause was tried to the court and a jury, and a verdict rendered for the defendants. To reverse the judgment rendered on this verdict, the plaintiff has perfected an appeal to this court.

First, it is complained that the court erred in refusing the plaintiff permission to dismiss the action at his cost. It appears that on the day the cause was set for trial the plaintiff, through his counsel, made application to the court to dismiss the cause without prejudice at his cost. This application was denied. Under section 5126, Rev. Laws 1910, the plaintiff had a right to dismiss the action at his cost without an order of court. It seems that counsel did not know this. We are inclined to think that the court should have advised counsel of his rights in this regard when the application for the order dismissing the cause was made. (Counsel appearing on the brief did not try the case below.)

Again, it is complained that the court erred in denying the plaintiff's application for a continuance. After the court had denied the application to dismiss the cause, the plaintiff then presented a sworn showing for a continuance for the term, and among the grounds therefor alleged that the plaintiff was not present in court, and that he resided in the state of Iowa, and that he was a material witness in the cause, setting out the testimony the plaintiff was expected to give, and that he was not present for the reason that counsel had expected the action to be dismissed, and had advised him that it would be dismissed, and that it was not necessary for him to incur the expense necessary in coming from his home in Iowa.

While this application was addressed to the discretion of the trial court, we are inclined to believe that denying the continuance was, in the light of the subsequent proceedings at the trial, an abuse of discretion. An examination of the record discloses that there were numerous errors made by the court in admitting over the objection of the plaintiff incompetent and irrelevant testimony, and in refusing to admit competent and material testimony offered. An examination of the instructions of the court to the jury, although they were not properly excepted to, nor proper instructions requested, shows that the court did not correctly state the rules of law arising upon the issues made by the pleadings. For instance, in instruction No. 8, the jury was told:

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"That the burden of proof is on the plaintiff to show that the note was given for a valuable consideration; that, if that was doubtful upon the whole evidence, the plaintiff could not recover."

Again, in instruction No. 11, which reads as follows:

"A negotiable instrument is a term applied to a contract, the right of action on which is capable of being transferred by indorsement in case the note is to a particular party named therein, or his order, or by delivery of the instrument in the event the undertaking is made to a particular person or bearer."

Again, in instruction No. 13:

"If the contract upon which the signatures to the instrument were obtained was not carried out or complied with by the party obtaining the signatures, then the persons signing the same would be released from liability thereon."

Again, in instruction No. 14:

"You are further instructed that, if the signatures were obtained to the instrument as a preliminary to an organization, the object of which was to complete a definite contract for a definite purpose, and the organization of the person signing the instrument was never perfected, then the person signing the instrument as a preparatory measure could not be held liable."

These instructions do not embody correct statements of the rules of law arising upon the issues in this cause, or in fact in any case, and they must have been confusing to the jury, rather than affording them light in deciding the issues raised.

The important issues in the case were: First. Whether or not the note in suit had been changed after its delivery, and without the knowledge or consent of the makers. If it had been changed, and the changes were material under the law, the makers of the note were not liable thereon, even in the hands of a *bona fide* holder. *Bank v. Baughman*, 27 Okla. 175, 111 Pac. 332. Second. Another important issue was whether or not the plaintiff was a *bona fide* holder of the note in suit. If he was, then the evidence admitted in regard to the oral contract entered into with the payee's agent at the time of the execution of the note was not admissible. These vital issues in the case were not properly submitted to the jury.

Rea v. Lewis.

Upon the whole record we are convinced that the plaintiff did not have a fair and impartial trial, and that the judgment appealed from should be reversed, and the cause remanded for a new trial.

By the Court: It is so ordered.

REA v. LEWIS.

No. 3613. Opinion Filed March 24, 1914.

(139 Pac. 977)

1. **CANCELLATION OF INSTRUMENTS—Sufficiency of Evidence.** The finding of facts by the trial court is amply supported by the evidence.
2. **SAME—Conclusions of Law.** The court's conclusions of law are correct as applied to the finding of facts.
3. **CANCELLATION OF INSTRUMENTS—Conditions Precedent—Return of Consideration.** L. and R. entered into a written contract by which L. was to trade R. certain lands and \$2,100 for a stock of drugs, etc. L. delivered a deed to one tract of the land, and paid R. \$1,000 in money, and took possession of the goods, and while running the store, and perfecting title to the other lands, R. fraudulently obtained the possession of the stock of goods, and refused to further proceed with the trade. L. sued for rescission of the contract, cancellation of his deeds, and a return of the money he had paid. L. did not, however, offer in his petition to restore to R. a small amount of money received by him on the sale of goods while in possession of the store. **Held** that, as R. had in his hands moneys paid by L. on the contract far in excess of the money he had received, it was not vitally necessary that an offer to restore be stated in the petition.

(Syllabus by Brewer, C.)

Error from District Court, Pontotoc County;

S. H. Russell, Assigned Judge.

Action by J. A. Lewis against W. C. Rea for rescission of contract, cancellation of deeds, and damages to cover payments made. Judgment for plaintiff, and defendant brings error. Affirmed, with directions to enter *remittitur*.

Bullock & Kerr, for plaintiff in error.

George M. Nicholson and Emanuel & Broadbent, for defendant in error.

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Opinion by BREWER, C. On November 23, 1909, the parties to this suit entered into a written contract which was modified by a supplemental contract entered into December 1, 1909. The contracts, construed as a whole, provided, in substance and in brief, that Rea should sell his stock of drugs, sundries, and fixtures to Lewis, and that he was to receive from Lewis as consideration a two-fifths interest in about 210 acres of land, and the title to 119 acres of land, subject to a mortgage thereon, and also the sum of \$2,100, and some other minor payments.

The evidence shows that the deed to the 119 acres of land was executed and delivered, and that to the two-fifths interest in the 210-acre tract was executed; but it seems there was some hitch in clearing the title of a record incumbrance. Lewis paid Rea \$1,000 in cash of the \$2,100 agreed to be paid, and on December 1, 1909, went into possession of the stock of drugs, continuing the business in Rea's name, and keeping Rea in the store, pending the clearing up of the objections to the title to the 210-acre tract of land and the payment of the balance of the money agreed upon. About December 21, 1909, Rea obtained from Lewis the keys to the store on the pretext that he wanted to get some diamonds out of the safe he had been holding there for others. After getting the keys, he assumed full possession and control of the store, and refused to surrender same back to Lewis. While Lewis was gone to Dallas to clear up the title in question between them, Rea purchased another stock of drugs, and moved them into the store in dispute. Lewis then brought suit for a rescission of the contract, a cancellation of the deeds he had executed, and for damages to cover the payments he had made. The cause was tried to the court, which found on all points in favor of Lewis, and entered a decree in his favor, rescinding the contract, canceling the deeds, and awarding judgment in the sum of \$643.44, which represented the payment of \$1,000 made in cash, less cash received on the sale of goods by Lewis while in possession of the store. From this finding and decree, Rea, as plaintiff in error, appeals, and urges here (1) that the findings of fact are not supported by the evidence; (2)

that the conclusions of law are not supported by the findings of fact; (3) the judgment is contrary to law.

The following, among others, are specific findings of fact made by the court:

"Third. That plaintiff conveyed to the defendant the 119-acre tract of land referred to, and executed and delivered to Bullock & Kerr, attorneys for said defendant, for said defendant, deeds conveying the said two-fifths interest in the 210-acre tract referred to; that said plaintiff was proceeding with due diligence, and in good faith, to procure the necessary instruments to make the title to said land perfect, and had paid said defendant on said sum of \$2,100 two payments of \$500 each a few days apart, which payments were accepted by said defendant without objection or comment on his part."

"Sixth. The court further finds that said defendant fraudulently obtained possession of the keys to said store, and that his actions in repossessing himself of said stock of goods and fixtures was arbitrary, inequitable, unlawful, and done without regard to the right of this plaintiff, and in violation of the contract hereinbefore mentioned, and without any offer to restore the *status quo*."

"Eighth. The court further finds that said defendant is guilty of a breach of said contracts, and that said breach was in no manner occasioned by the acts of said plaintiff, and that said plaintiff was using every effort upon his part to comply with the terms of said contract."

1. Under the objection first mentioned plaintiff in error claims that the court erred in finding that "said defendant [Rea], immediately upon obtaining possession of said keys, * * * intermingled other stocks of merchandise with the stock in question."

On this point the evidence shows that the defendant, within three or four days after getting possession and control of the store, and in the absence of plaintiff, moved part of another stock of goods into the store, and gave that fact as a reason for not going on with the contract. It is testified that he said, "I have got some of this other stock in here now, and I will not consider it further."

If this was a sufficient excuse or any reason for calling the deal off, it must have been because one stock had been more or

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less mixed or confused with the other; in fact, however, whether or not the goods were intermingled is not important.

It is also urged that the finding of the court that defendant fraudulently obtained possession of the keys, etc., as set out in the sixth finding is not supported by evidence. On this point it is shown that Rea asked and obtained the keys from Lewis, under the claim that he had some special cause for entering the store, and then refused to return them, and took and held the physical possession of the building and goods against the protests of Lewis, and proceeded to continue and conduct the business. It seems very clear to us that the finding of fact is based on evidence; the keys, and thereby the possession of the property, were obtained by deceit and subterfuge, without any attempt at rescission of the contract, and at a time when Lewis was proceeding to comply with his contract.

2. The conclusions of law were justified under and fully sustained by the findings of fact.

3. The next and final point is made that the judgment of the court is contrary to law. This point is based, as we construe the brief, on the failure of Lewis to have offered to restore to Rea the proceeds of the sale of the goods while in possession of the stock, and also the value of two watches taken out of stock by him. It is true the petition makes no such formal offer to surrender these funds; but, under the petition and all the proof, Rea had in his possession the \$1,000 paid him under the contract, which was largely in excess of the amount of goods sold, and as a matter of fact the court restored to Rea the proceeds of the sales by deducting same from the \$1,000 in the decree. The technical oversight of failing to make this offer in the petition was caused by the evidence and the decree, and Rea has no right to complain of the matter. As to the two watches, of the total value of \$45, we think under the evidence that Rea should have been credited with this sum. The chances are the court overlooked this comparatively important item. The defendant in error should enter a *remititur* in this court of \$45, and upon doing so the cause should be affirmed.

By the Court: It is so ordered.

Board of Com'rs of Beaver County v. Culwell et al.

BOARD OF COM'RS OF BEAVER COUNTY v.
CULWELL *et al.*

No. 3616. Opinion Filed March 24, 1914.

(139 Pac. 979.)

OFFICERS—County Judge—Salary—Increase. Beaver county having a population of more than 10,000 and less than 15,000, the salary of the county judge elected for the term commencing November 16, 1907, and "ending on the day next preceding the second Monday in January, 1911" (sec. 11, art. 7, Williams' Const. Okla.), was fixed at \$1,200 per annum (sec. 11, c. 15, Sess. Laws 1897, and section 18, article 25, Williams' Ann. Const. Okla.), and such judge could not claim an increase of salary under the act of June 4, 1908 (Sess. Laws 1907-08, c. 27, art. 3, sec. 1), on account of the constitutional provision (section 10, article 23) forbidding the increase of salary "during the term of his office," and for the further reason that it appears from the act of June 4, 1908, that it was not intended for the benefit of "present incumbents," and does not bring him within the limitation "until otherwise provided by law," set out in section 18 of article 25, Williams' Ann. Const. of Okla.

(Syllabus by Galbraith, C.)

Error from District Court, Beaver County;
Theodore Pruett, Special Judge.

Action by the Board of County Commissioners of Beaver County against J. W. Culwell and others. Judgment for the plaintiff, and plaintiff brings error. Reversed and rendered.

John A. Spohn and Phillip E. Winter, for plaintiff in error.

Opinion by GALBRAITH, C. This action was commenced in the district court of Beaver county against J. W. Culwell, who was county judge of said county from November 16, 1907, to June 19, 1909, and the sureties on his official bond, to recover a balance which it was alleged he had retained from the fees of his office over and above the amount due him as salary. There was a trial by agreement before the court, and a judgment rendered for the county in the sum of \$152.12. To reverse this judgment, the county has perfected an appeal to this court.

There is but one question presented on this appeal, and that is whether or not the act of the Legislature of June 4, 1908,

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which provided for an increase of the salary of county judges in the state, authorized the defendant Culwell to claim the increased salary allowed by this act after its passage; or did his salary remain as fixed by the laws of Oklahoma at the time of his qualification? The finding is that Culwell collected as fees from the office, between November 16, 1907, and June 19, 1909, the total sum of \$3,424.98; that he paid into the county treasury \$548.86, and paid out for clerk hire \$501.50, and retained the balance of \$2,374.62 as his salary. It is also found that the receipts of said office between November 16, 1907, and June 19, 1909, did not exceed \$1,200 per annum, and that the population of the county was more than 10,000 and less than 15,000. The court found, as a conclusion of law, that Culwell was entitled to \$1,200 per annum salary for the period between November 16, 1907, and June 4, 1908, and \$1,500 per annum from June 4, 1908, to June 19, 1909, and could retain the amount of his salary out of the earnings of his office, and that the total salary due him from November 16, 1907, to June 19, 1909, was \$2,222.50, and rendered judgment against the defendant and his sureties for the difference between this amount and the total amount of the receipts, being about \$152.12.

The defendant Culwell was elected county judge of Beaver county for a term commencing November 16, 1907, and ending "at the close of the day next preceding the second Monday in January, 1911." Section 11, art. 7, Williams' Ann. Const. Okla.

Section 10, art. 23, of Williams' Ann. Const. Okla. reads:

"Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, unless by operation of law enacted prior to such election or appointment; nor shall the term of any public official be extended beyond the period for which he was elected or appointed: Provided, that all officials within this state shall continue to perform the duties of their offices until their successors shall be duly qualified."

The salary of the defendant Culwell as county judge of Beaver county, at the time of his election, was fixed by law at \$1,200. Section 11, c. 15, Session Laws 1897.

"Until otherwise provided by law, the terms, duties, powers, qualifications and salary and compensation of all county and township officers, not otherwise provided by this Constitution, shall be as now provided by the laws of the territory of Oklahoma for like named officers, and the duties and compensation of the probate judge under such laws shall devolve upon and belong to the judge of the county court." (Section 18, article 25, Williams' Ann. Const. Okla.)

The act of June 4, 1908 (Sess. Laws 1907-08, c. 27), was not passed "prior to the election" of the defendant Culwell to the office of county judge of Beaver county; hence the provisions of section 10, art. 23, above quoted, forbidding the increase of his salary "during the term of his office," would render this act of the Legislature ineffective, so far as this defendant is concerned, unless it was clear that the subsequent act was intended for the benefit of "present incumbents," so as to bring these within the limitation "until otherwise provided by law," set out in section 18 of the Constitution above quoted. However, it does appear that the Legislature did not intend the increase in salary to apply to county judges then in office; for it is provided in section 1, art. 3, of said act as follows:

"Provided, this shall not affect the salary of present incumbents where fixed by the Constitution during their present term of office."

Culwell was a "present incumbent," and his salary was fixed by the Constitution (section 18, art. 25), and therefore he was excluded from claiming the benefit of this act, and his salary remained as it was fixed at the commencement of his term. The court below erred in holding to the contrary. *State ex rel. Brady v. Frear, County Judge*, 21 Okla. 397, 96 Pac. 628; *Harris Finley v. Territory of Oklahoma*, 12 Okla. 621, 73 Pac. 273; *State v. Hooker*, 26 Okla. 460, 109 Pac. 527; *Moore v. Nation*, 80 Kan. 672, 103 Pac. 107, 23 L. R. A. (N. S.) 1115, 18 Ann. Cas. 397.

No question is raised about the right of the county to have the defendant Culwell account for the balance of the fees retained by him in excess of the amount due him as salary.

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We conclude that the court below was in error in allowing him his salary at the rate of \$1,500 per annum for any part of his term, and that his salary for the entire time served should be calculated at the rate of \$1,200 per annum, and that the judgment appealed from should be reversed, and the cause remanded to the district court of Beaver county, with directions to calculate the salary of Culwell as county judge from November 16, 1907, to June 19, 1909, at the rate of \$1,200 per annum, and credit the sum of \$2,374.63 retained by him as salary, and render judgment against the defendants in error and in favor of the plaintiff in error for the balance, with interest thereon from the date the same should have been paid, June 19, 1909.

By the Court: It is so ordered.

BOARD OF COM'RS OF BEAVER COUNTY v.
LANGSTON *et al.*

No. 3617. Opinion Filed March 24, 1914.

(139 Pac. 956.)

1. **APPEAL AND ERROR—Review—Motion for New Trial.** To have reviewed in the Supreme Court errors occurring at the trial of a case, a motion for a new trial must have been filed and acted on by the trial court, exceptions taken thereto, and the ruling thereon assigned as error in the petition in error.
2. **SAME.** The action of the court upon a demurrer to the evidence, or on a motion to direct a verdict, is a matter occurring at the trial.

(Syllabus by Brewer, C.)

Error from District Court, Beaver County;
R. E. Dickson, Judge pro tem.

Action by the Board of County Commissioners of Beaver County against J. H. Langston and others. Judgment for defendants, and plaintiff brings error. Dismissed.

John A. Spohn, for plaintiff in error.

J. S. Harris and *John L. Gleason*, for defendants in error.

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Opinion by BREWER, C. The board of county commissioners of Beaver county sued W. H. Langston, formerly county clerk, together with the sureties on his official bond, for certain sums of money which it was alleged he had improperly retained as fees. The defendants for an answer filed a general denial. The cause was tried to a jury, and at the close of the evidence the court instructed the jury to find a verdict for the defendants. The jury returned the verdict according to the instructions of the court, and judgment was pronounced in accordance thereto.

Four assignments of error are set out in the petition in error filed in this court, but they all go to the action of the court in directing a verdict. No motion was filed for a new trial. To have reviewed in this court alleged errors occurring at the trial, a motion for a new trial and the ruling of the court thereon are necessary. *Martin v. Gassert*, 17 Okla. 177, 87 Pac. 586; *Meyer v. James*, 29 Okla. 7, 115 Pac. 1016; *Perkins v. Perkins*, 37 Okla. 693, 132 Pac. 1097; *St. L., I. M. & S. Ry. Co. v. Dyer*, 36 Okla. 112, 128 Pac. 265, and cases cited.

That the action of the court upon a demurrer to the evidence is a matter occurring at the trial, and to complain of which it requires a motion for a new trial, is a well-settled rule of this court. *Stump v. Porter*, 31 Okla. 157, 120 Pac. 639; *Ardmore O. & M. Co. v. Doggett Grain Co.*, 32 Okla. 280, 122 Pac. 241; *Insurance Co. v. Little*, 34 Okla. 449, 125 Pac. 1098, and cases cited. It necessarily follows, we think, that the action of the court upon a motion to direct a verdict is equally a matter occurring at the trial, and would therefore require, to have such action reviewed, the filing and overruling of a motion for a new trial. As none was filed in this case, we cannot review the action of the court complained of.

The cause should be dismissed.

By the Court: It is so ordered.

Whelchel v. Hendrix.

WHELCHER v. HENDRIX.

No. 3624. Opinion Filed March 24, 1914.

(139 Pac. 951.)

APPEAL AND ERROR—Review—Affirmance—Remand. Where, in a trial of an action by a broker to recover a commission alleged to have been earned, a number of issues are raised by the answer, one being a defect of parties plaintiff, and at the close of the evidence, the parties agree to submit this one issue to the jury, and a verdict is returned for the plaintiff, and judgment rendered thereon to the effect that there was no defect in parties plaintiff, and that the plaintiff could maintain the action, and that "the other issues raised should be tried in due course," the verdict of the jury being supported by sufficient evidence, **held** that, although there was no final judgment rendered in the case from which an appeal would lie, yet an appeal having been taken by consent and acquiescence, the ends of justice will be subserved by affirming the judgment appealed from and remanding the cause for trial on the other issues raised by the pleadings.

(Syllabus by Galbraith, C.)

Error from County Court, Custer County;
J. C. McKnight, Judge.

Action by S. J. Hendrix against W. E. Whelchel. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. T. Webster, for plaintiff in error.

Carter Smith and Darnell & Darnell, for defendant in error.

Opinion by GALBRAITH, C. S. J. Hendrix commenced an action in the county court of Custer county against W. E. Whelchel to recover a commission as real estate broker, alleged to have been earned in a deal whereby Whelchel's stock of merchandise was exchanged for a farm. The reasonable value of this commission was alleged to be \$669. The defendant answered, first, by a general denial; second, by alleging that the plaintiff, Hendrix, was never authorized to act as his agent in making the trade, and that as a matter of fact he had nothing to do with the making of the same; and, third, by alleging that at the time the trade was made the plaintiff, Hendrix, and one C. M. Rake

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were partners in business, and that if the commission had been earned it belonged to the partnership, and the plaintiff could not maintain the suit in his own name for it. A reply by way of general denial was filed to the answer, and upon the issues thus formed the cause was submitted to the court and a jury for trial. At the close of the evidence it seems that both parties agreed that the issue raised by the plea in abatement should be submitted to the jury, as to whether or not there was a defect of parties plaintiff and Hendrix could maintain the action alone. The court instructed the jury as to the law and submitted to them this one issue.

The jury returned a verdict that there was no defect of parties plaintiff, and that the partnership relations between the plaintiff and C. M. Rake did not exist at the time the trade was made. A judgment was entered upon this verdict as follows:

"It is therefore ordered, considered, and adjudged by the court that there is no defect of parties plaintiff in this action, and that the trial of the issues aside from the plea of abatement or defect of parties plaintiff herein entered and joined shall be had in due course."

A motion was made for judgment for the defendant notwithstanding the verdict of the jury, and was overruled, and exception saved. There was also a motion for new trial, which was overruled, and time was taken to make and serve case-made on appeal to this court.

No legal reason appears why all the issues raised by the pleadings were not submitted to the jury and the case fully tried, or why this case should be tried in sections; but it does appear that there was no final judgment entered in said cause, from which an appeal would lie to this court. However, counsel have not raised this question, and ordinarily the court would raise the question of its own motion; but it does not seem that anything would be gained by doing so in this instance. The testimony was conflicting on the question of partnership, but there is ample evidence to support the findings and verdict of the jury on this issue, and the verdict is therefore conclusive upon this court upon that question, and it seems that the ends of justice

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would be subverted by affirming the judgment rendered and remanding the cause to the county court of Custer county, for a trial on the remaining issues raised by the pleadings; and we therefore recommend that it be so ordered, and that the costs of this appeal be taxed against the plaintiff in error.

By the Court: It is so ordered.

FARMERS' & MERCHANTS' BANK v. SCOGGINS.

No. 3631. Opinion Filed March 24, 1914.

(139 Pac. 959.)

1. **APPEAL AND ERROR—Review—Sufficiency of Evidence.** In the trial of an action in replevin, the answer was, first, a general denial, and, second, an affirmative defense tending to defeat the right of the plaintiff to recover; the cause was submitted to the jury upon proper instructions as to the law arising upon the issues raised, and the verdict is supported by sufficient evidence; the judgment will not be disturbed upon appeal.
2. **BILLS AND NOTES—Alterations—Materiality.** A promissory note executed January 2, 1909, containing the following clause: "And in case of legal proceedings on this note I agree to pay 10% additional as attorney's fees"—was nonnegotiable, and if after the execution of the note, and without the consent of the maker, such clause is eliminated by running a pen through the same, such elimination made the note negotiable, and such change was a material alteration which rendered the note void as against the maker, even in the hands of a *bona fide* holder for value.

(Syllabus by Galbraith, C.)

Error from District Court, Comanche County;
J. T. Johnson, Judge.

Action by the Farmers' & Merchants' Bank against J. W. Scoggins. Judgment for defendant, and plaintiff brings error. Affirmed.

H. A. Smith, for plaintiff in error.

S. M. Cunningham, *A. M. Reinwand*, and *R. J. Ray*, for defendant in error.

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Opinion by GALBRAITH, C. On the 15th day of March, 1909, the plaintiff in error commenced an action in the district court of Comanche county in replevin to recover the possession of certain chattels described in a mortgage given to secure a note for \$1,000, dated January 2, 1909, and due January 15th thereafter, payable to Pearl C. Shelly, and alleged to have been indorsed to the plaintiff in error in due course of business and for value prior to maturity. The order of replevin was issued, and the property seized. In the time allowed by law the defendant, J. W. Scoggins, gave a redelivery bond and caused a redelivery of the property to him. The petition was in regular form. The defendant answered in two counts, in the first of which he denied generally and specially the execution of the note and mortgage as alleged, and denied that he was indebted to the payee of the note at the time alleged. And, second, it was alleged that on January 2, 1909, one W. W. Swift, an attorney of Lawton, acting in collusion with Pearl C. Shelly, and for the purpose of extorting money from the defendant, wrongfully and unlawfully caused the said Pearl C. Shelly to make complaint to the county court of Comanche county, falsely and fraudulently charging the defendant with being the father of her bastard child, and caused a warrant to issue on such complaint for the arrest of the defendant, and that the said Swift, on said day, in company with the deputy sheriff, went to the place of defendant's residence and caused him to be placed under arrest, and that Swift then and there unlawfully, falsely, and fraudulently represented to the defendant that if he would pay \$1,000 to him for Pearl C. Shelly this would be accepted in full settlement and the defendant would be discharged; that the defendant, being without counsel and under duress, and relying upon said false and fraudulent representation, executed a note and mortgage in the sum of \$1,000; and further that, without the knowledge or consent of the defendant, said note was altered after its delivery in this, to wit, the words in said note, "and in case of legal proceedings on this note I agree to pay 10% additional as attorney's fees," were stricken out by running a pen through said clause and thereby erasing the same from the note, and thereby changing the note

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after its delivery to said Swift from a nonnegotiable to a negotiable instrument, and that the same was thereafter transferred and assigned to the plaintiff for the purpose of placing the note and mortgage in the hands of a third party, and the purpose of such transfer was to prevent the defendant from setting up his defense against the payment of the note, and for these reasons the note and mortgage were void—and praying for the cancellation of the note and mortgage and judgment against the plaintiff for cost. This answer was duly verified. A demurrer was filed to the answer on the ground that it did not state facts sufficient to constitute a defense to the cause of action and was overruled. A reply by way of general denial was filed to the answer. Upon the issues thus formed, the cause was submitted to the court and jury for trial, and a verdict returned for the defendant. After the overruling of the motion for new trial, the plaintiff perfected an appeal to this court by petition in error and case-made.

Error is assigned: First. In overruling the motion of plaintiff for judgment on the pleadings. Second. In denying motion for new trial. Third. In overruling the objection to the wife of defendant testifying in said cause. Fourth. In giving certain specified instructions. Fifth. That the judgment rendered was contrary to the law and the evidence.

The first assignment is not well taken, for the reason that the first paragraph of the defendant's answer was a general and special denial of the facts constituting the plaintiff's cause of action as set out in the petition, and the second paragraph of the answer set out an affirmative defense that was good if sustained by the proof. There was no error in denying the motion for new trial, since the only ground upon which the motion might have been sustained was the allegations of facts set out in the fourth ground of the motion, which were not supported by affidavit or other proof, and therefore were not sufficient to warrant the court in sustaining the same. There was no error in overruling the objection to the wife of the defendant testifying in the case, since she was permitted to testify simply to the payment made on the note on the day of its execution, which she testified she made as agent for her husband. The assignment

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based upon the errors of the court's instructions cannot be considered, for the reason that there were no proper exceptions taken to the instructions of the court when given.

It was not error for the court to render judgment for the defendant upon the verdict of the jury. The court properly instructed the jury as to the rules of law by which to determine the several issues raised by the pleadings. If the provision in the note providing for attorney's fee had been erased therefrom, after its execution and delivery, without the consent of the defendant, that was a material alteration in the note and vitiated the same, even in the hands of a *bona fide* holder. It was said by this court:

"If the note was materially altered after execution, plaintiff's right to recovery cannot be established by showing that he is a *bona fide* holder of the note. A material alteration of a note by the payee or holder without the consent of the maker avoids it against the maker, even in the hands of a *bona fide* holder, without notice of such alteration. *Overton v. Matthews et al.*, 35 Ark. 146, 37 Am. Rep. 9; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; 2 Daniel on Negotiable Instruments, pars. 1373, 1374. Whether an alteration is material does not depend upon whether it increases or reduces the maker's liability. The test is whether the instrument, after the alteration, expresses the same contract; whether it will have the same operation and effect after the alteration as before. If the change enlarges or lessens the liability, it is material, and vitiates the contract. 3 Am. & Eng. Encyc. of Law & Prac. p. 401. *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 362, 12 Ann. Cas. 677; is in point." (*Commonwealth National Bank v. Baughman*, 27 Okla. 175, at page 177, 111 Pac. 332, at page 333.)

The law in this state, at the time of the execution of this note, was that a provision in a promissory note for the payment of an attorney's fee in addition to the principal and interest rendered the note nonnegotiable. *Clowers et al. v. Snowden et al.*, 21 Okla. 476, 96 Pac. 596.

The principal issues in the instant case were issues of fact which were properly submitted to the jury for determination, and since all of these issues were controverted, and there is ample

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evidence to support the findings of the jury thereon, the verdict is conclusive on this court.

There appearing to be no prejudicial errors presented by the assignments of error, the same should be overruled, and the judgment appealed from should be affirmed.

By the Court: It is so ordered.

PARKER *et al.* v. BOARD OF COM'RS OF TILLMAN COUNTY.

No. 3644. Opinion Filed March 24, 1914.

(139 Pac. 981.)

1. **COUNTIES—Proceedings by Commissioners—Decisions Appealable.** Where the county commissioners have advertised for bids to erect a bridge across a large creek on a section line, and on the date for opening the bids some private citizens and taxpayers appear before the board in session and orally "protest against the location of the bridge at the point named in the advertisement," and the board overrules such protest, and proceeds to let the contract, **held**, that the action of the board on the protest was not a "decision of the board on a matter properly before it," from which an appeal to the district court will lie, for the reason that such action was merely the exercise by the board of ministerial and administrative authority vested in it by the law.
2. **SAME—Appeal—Extent of Jurisdiction.** Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only; same being confined to the jurisdiction the board had and none other, to an inquiring, *de novo*, as to the very matter upon which the board was called upon to act. Such appeal cannot be converted into an action in equity so as to enlarge the jurisdiction beyond that of the inferior tribunal.

(Syllabus by Brewer, C.)

Error from District Court, Tillman County;
J. T. Johnson, Judge.

The protest of A. Parker and others against an action of the Board of County Commissioners of Tillman County being overruled, they appealed to the district court, and, from the action of that court in sustaining a demurrer to the petition in appeal, bring error. Affirmed.

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Mounts & Davis and W. E. Hudson, for plaintiffs in error.

H. P. McGuire and S. W. Johnson, for defendant in error.

Opinion by BREWER, C. In October, 1910, the board of county commissioners of Tillman county gave notice by proper advertisement that on December 5, 1910, they would open sealed bids for the erection of a steel bridge across a creek between sections 12 and 13 of a certain township in said county. On the date named for opening and considering the bids to build the bridge at the points designated, A. Parker and certain other individuals, claiming to represent themselves and other taxpayers, appeared before the board of county commissioners while it was in session; the record proceedings showing as follows:

"That said persons appeared and protested against the erection and construction of said bridge at said point and requested the board of county commissioners of Tillman county, Okla., to hear proof and give them a hearing as to whether said bridge should be located at said point."

So far as the record shows, this protest was verbal and was overruled and ignored by the board, which proceeded to open bids and award the contract for the bridge to the lowest responsible bidder. On the same date a written notice was filed with the board of county commissioners of an intention to appeal from the action of the board to the district court, which was later done, where a lengthy statement of the matter was prepared and filed in the nature of a petition setting out at considerable length the grievances of appellants. The matter coming up for hearing in the district court, a demurrer was sustained to the petition in appeal, and upon this decision of the district court error is predicated, and the cause brought here for review.

The district court was evidently of the opinion that it was without jurisdiction in the matter; in other words, that the action of the commissioners, sought to be appealed from, was not an appealable order. Our statute (section 1690, Comp. Laws 1909; section 1640, Rev. Laws 1910) provides for an appeal to the district court "from all decisions of the board of commissioners upon matters properly before them," etc.

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It has been very generally held that statutes of this nature providing generally for appeals from the action of the county boards is confined to decisions involving the exercise of the judicial power and discretion lodged in such boards, and that it does not include the right of appeal from the action of the board where such action is ministerial, or is had in the exercise of the administrative power or functions of the board. It was so held in *Territory v. Neville et al.*, 10 Okla. 79, 60 Pac. 790, where numerous decisions are cited and discussed by the court. In that case it was held:

"The action of the board of county commissioners in ordering an election to determine the location of a county seat is a ministerial act, and not a judicial decision, in which an appeal lies to the district court."

As to ministerial or executive duties, see *Jamieson v. State Board of Medical Examiners*, 35 Okla. 685, 130 Pac. 923. In 11 Cyc., beginning at page 405, in discussing the question of appeals from county boards, it is said:

"* * * But in most jurisdictions express statutory provision is made for the taking of appeals from such decisions and orders, where they are final, judicial in their character, and are made in regard to matters affecting the rights of an individual as distinguished from the public. If, however, in rendering its decision the board acts in a purely ministerial or administrative capacity, no appeal will lie. So where the matter involves no question of the legal right, but simply a matter for the exercise of the discretion of the board, an appeal from its action on such matter is not authorized," etc.

In *State v. Board of Commissioners*, 29 S. D. 358, 137 N. W. 354, the decision and determination of the county commissioners to submit to the voters the question as to whether liquor licenses should be granted was held to be a "purely administrative act upon the part of the body vested with that authority," and is not such an action as can be reviewed on appeal.

In *Dudley et al. v. Blountsville et al.*, 39 Ind. 288, it is held:

"No appeal lies from the decision of a board of county commissioners upon an application of a turnpike company for leave to construct its road along a public highway."

In *Farley v. Board of Commissioners*, 126 Ind. 468, 26 N. E. 174, it is held that an order made by the board allowing certain

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animals to run at large "is an administrative, not a judicial act, and an appeal will not lie from such order." And in the body of the opinion it is said:

"As the law is now settled in this state, the only room for uncertainty in determining when appeals will, and when they will not, lie from the decisions of boards of county commissioners, is in determining whether the given decision is judicial in its character, or whether in making such decision the board acted in a ministerial or administrative capacity. If the decision is judicial in its nature, an appeal will lie, unless expressly or impliedly forbidden by statute. If, however, in making such decision the board acted in a purely ministerial or administrative capacity, or in the exercise of a discretionary power, no appeal will lie. *Padgett v. State*, 93 Ind. 396, and cases there cited."

In *Potts v. Bennett et al.*, 140 Ind. 71, 39 N. E. 518, the court held that the action of the board in taking out insurance on public buildings in which the premium exceeded \$3,000 involved only the ministerial or administrative powers of the board and that no appeal would lie from such action. The court in the opinion says:

"The power exercised in the case before us in entering into the insurance contracts was purely ministerial or administrative in its character, and the board in exercising it acted in their capacity as a corporation and not as a court; their act being that of the county in its corporate capacity. So long as they acted in good faith and within the powers conferred on them by the statute, their acts cannot be brought in question by appeal."

In *Hayes v. Rogers et al.*, 24 Kan. 143, which was a case where the board of county commissioners made an order rearranging the commissioners' districts so as to change the former boundaries, and changing territory from the old to the new districts to take effect on publication, etc., some electors attempted to appeal from this order. In discussing the effect of this appeal, Mr. Justice Brewer says:

"A final proposition is that the order was stayed by the attempted appeal. We do not think the appeal amounted to anything. We do not understand that a mere political and governmental order of the county board—one not affecting private rights—can, by one interested solely as an elector, be taken on appeal to the district court. Where some distinct private right is trespassed upon, a party injured thereby may take the order

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up by appeal and have it reviewed; but a certain amount of legislative power is given to the commissioners, and their action in these respects is not the subject of review by appeal, except where specifically so provided. It would be strange if all political and legislative action of the county board could be stayed by any one willing to give an appeal bond. We do not think this a matter subject to appeal at the instance of one who has no other interest than that of an elector.*

The board of county commissioners, when acting as such, represents the county. It administers its internal affairs and performs for it its governmental functions. Under the statute (Comp. Laws 1909, sec. 7860) it is given sole control of all bridges over twenty feet long in the county with power to contract for the erection and maintenance of such improvements. Section 7783, *Id.* (Rev. Laws 1910, sec. 7581) is to the same general effect, putting all bridges more than twenty feet long under the control and supervision of the board, and specifically providing that such bridges shall be built at such places as may be necessary for the public convenience, etc. Section 7811, Comp. Laws 1909 (Rev. Laws 1910, sec. 7609), directs that "the board of county commissioners shall provide all roads improved under the provisions of this act with suitable bridges of a permanent and substantial character and shall keep and maintain same in repairs."

In this case it will be borne in mind that the protest before the board did not extend to any claim of irregularity in the preliminary notices upon which bids were to be received, nor did it challenge the right to build a bridge for want of funds, or for any other reason. It simply went to the one point alone; that being that these individuals thought that the bridge to be built and which they evidently wanted built should not be built at this particular point—that is to say, on the section line between sections 12 and 13 where it crosses a large creek. We are led to believe from an examination of a great many authorities, some of which are cited above, that the board of county commissioners in designating the point for the bridge in question were merely exercising an administrative or governmental function, imposed upon them by the law, and that, such being the case,

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their ignoring or overruling a verbal protest expressed by these individuals did not constitute action and decision upon matters properly before the board from which an appeal would lie to the district court, and that therefore the action of the court was not erroneous.

We are aware that in the petition filed in the district court appellants undertake to extend the scope of their protest and grievances, and that in the brief filed here the argument has taken wide range, attacking almost every step in the proceedings under which the contract was later let for the building of the bridge; but none of these matters are involved in the action of the board appealed from. What they appealed from and its scope is confined to the matter upon which the board acted; to the very thing which was brought before it by the aggrieved parties.

It has been said in this court (*Bostick v. Board of County Com'rs*, 19 Okla. 92, 91 Pac. 1125):

"Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only, which is the jurisdiction that the inferior tribunal had and none other; and in such case the district court cannot convert such action into an action of equity and assume a jurisdiction of equity that the inferior tribunal did not have."

The cause should be affirmed.

By the Court: It is so ordered.

BYERS v. SUN SAVINGS BANK.

No. 3122. Opinion Filed February 28, 1914.

Rehearing Denied March 28, 1914.

(139 Pac. 948.)

1. **CONVICTS—Capacity to Contract—Mortgage.** Under our statutes a person convicted of a felony is not divested of all rights whatever and rendered absolutely *civiliter mortuus*, but may contract with an attorney or other person to obtain a parole, a pardon, or to sue for a writ of *habeas corpus*, and this, in the absence of an express statute to the contrary, or some express provision for the management of his estate, necessarily carries with it the right to dispose of his property in order to employ counsel.

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2. **CIVIL RIGHTS—Definition**—"Natural Rights"—"Civil Rights." By the term "natural rights" is meant those rights which are necessarily inherent, rights which are innate and which come from the very elementary laws of nature, such as life, liberty, the pursuit of happiness, and self-preservation.

By the term "civil rights," in its broader sense, is meant those rights which are the outgrowth of civilization, which arise from the needs of civil as distinguished from barbaric communities, and are given, defined, and circumscribed by such positive laws enacted by such communities as are necessary to the maintenance of organized government, and the term comprehends all rights which civilized communities undertake, by the enactment of positive laws, to prescribe, abridge, protect, and enforce.

(Syllabus by Harrison, C.)

*Error from District Court, Kiowa County;
James R. Tolbert, Judge.*

Action by the Sun Savings Bank against Andrew N. Byers on a promissory note. Judgment for plaintiff, and defendant brings error. Affirmed.

John T. Hays, J. S. Carpenter, and J. G. Hughes, for plaintiff in error.

A. J. Biddison and Harry Campbell, for defendant in error.

Opinion by HARRISON, C. This was an action upon a promissory note for \$1,000 and interest as provided in the note and to foreclose a mortgage given on certain town lots in the town of Gotebo, Okla., to secure the payment of same. The note and mortgage in question had been executed by the defendant, Byers, while under sentence and confinement in the penitentiary for a felony. It was executed to one G. C. Sheffer, an attorney, as a fee for obtaining a parole. The contract was entered into and executed and the parole obtained afterwards. After Byers was paroled, he further ratified the contract by promise in writing. The only material defense made was that, under our statutes, Byers had no authority to contract while under confinement for a felony, and that he had no power to ratify such contract after he was paroled, for the reason that the sentence to confinement in the penitentiary was not removed by the parole. The cause was tried before Judge James R. Tolbert in the district court of Kiowa county at the May term, 1911, and

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judgment rendered for the face of the note and interest and foreclosure of the mortgage. From such judgment defendant appeals.

Two important fundamental propositions are presented: First, whether an incarcerated felon has power to contract with an attorney to secure a pardon or parole. Second, if such contract be invalid, can it be validated by ratification after the parole is obtained. Both propositions are affirmed by the plaintiff bank. Both are denied by defendant Byers. Counsel for Byers contend: First, that under our statutes all civil rights of a person convicted of a felony, including the power to contract for any purpose, are suspended during the term of imprisonment; that he is civilly dead. Second, that such rights are not restored by a parole. Counsel for the bank contend: First, that the power to contract with an attorney for a parole or pardon is an inherent natural right which is not taken away by statute. Second, that if taken away, it is restored by parole. A determination of the first proposition necessitates an inquiry into what is meant by the terms "civil rights" and "natural rights," and what distinction exists between the terms, and how far "natural rights" are controlled or abridged by "civil rights." As we understand the term "natural rights" from a study of text-books, decisions, and lexicons, as well as from the rules of reason, are those rights which are necessarily inherent, rights which are innate, and which come from the very elementary laws of nature, such as life, liberty, the pursuit of happiness, and self-preservation. While by the term "civil rights," in its broader sense, is meant those rights which are the outgrowth of civilization, which arise from the needs of civil, as distinguished from barbaric communities, and are given, defined, and circumscribed by such positive laws, enacted by such communities, as are necessary to the maintenance of organized government. The term should not be confounded with, nor distinguished from, the term "political rights," as seems to have been done by some authorities. It is a broader and more comprehensive term than the term "political rights." The word "civil" is derived from the Latin "*civilis*," a citizen, as distinguished from a savage or barbarian.

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and the term "civil rights" comprehends all rights which civilized communities undertake, by the enactment of positive laws, to prescribe, abridge, protect, and enforce. "Political rights," therefore, such as the right of suffrage, the right to hold office, and the right to participate in the administration of governmental affairs, are included within and abridged, extended, protected, and enforced by the more comprehensive term "civil rights," which comprehends and circumscribes all rights which the code, written or unwritten, of a civilized community gives to its citizens, including the less comprehensive term "civil" as distinguished from "military" rights. See Webster's Unabridged Dictionary; Anderson's Law Dictionary; Black's Law Dictionary; Bouvier's Law Dictionary, title "Civil Rights"; 7 Cyc. title "Civil Rights"; 6 Am. & Eng. Enc. L. (2d Ed.) title, "Civil Rights."

The immediate inquiry therefore is: To what extent those primary rights which inhere from and are endowed by nature are limited or abridged by our statute. Section 732, Wilson's Rev. & Ann. St. 1903 (section 877, Rev. Laws 1910), reads as follows:

"All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights."

Section 2680, Wilson's Rev. & Ann. St. 1903 (section 2813, Rev. Laws, 1910), reads:

"A sentence of imprisonment in the penitentiary for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority or power, during the term of such imprisonment."

The language of these statutes, in the absence of other recognized and established principles of law, would seem to divest a citizen of all rights whatsoever and render him absolutely *civilliter mortuus*, but the principles of law which this verbiage literally imports had its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government. At any rate, the full significance of

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such statutes has never been enforced by our courts, for the principal reason that they are out of harmony with the spirit of our fundamental laws and with other provisions of statutes. The ancient doctrine of attainder is expressly forbidden by our federal Constitution and by the Constitution of each separate state, and the modern trend of American authorities has been to extend, rather than to limit, those natural rights, such as the right to own and dispose of one's own property, except in states where they are expressly abridged by statute, and other means, as by appointment of a trustee of the estate of convicts, expressly provided for, as in Missouri, Kansas, and Colorado. The following decisions clearly show the trend of American decisions and fully support the foregoing conclusions: *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368; *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232; *Rankin v. Rankin*, 6 T. B. Mon. (Ky.) 531, 17 Am. Dec. 161; *Estate of Donnelly*, 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62; *Gray v. Stewart*, 70 Kan. 429, 78 Pac. 852, 109 Am. St. Rep. 461; *Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Davis v. Lanning*, 85 Tex. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. Rep. 784; *Guarantee Co. of N. Am. v. First Nat. Bank of Lynchburg*, 95 Va. 480, 28 S. E. 909; *Gray v. Gray*, 104 Mo. App. 520, 79 S. W. 505; *Frazer v. Fulcher*, 17 Ohio, 261; *Stephani v. Lent*, 30 Misc. Rep. 346, 63 N. Y. Supp. 471; 9 Cyc. 872, 873, and authorities cited in notes; 6 Am. & Eng. Enc. L. (2d Ed.) title "Civil Death"; and authorities cited in texts.

While none of the foregoing decisions discusses and passes upon the entire proposition necessary to be determined here, yet upon the whole, taken as one entire exhaustive treatise upon the various questions arising under statutes similar to ours, they fully sustain the conclusions herein reached. In the case of *Stephani v. Lent*, *supra*, the exact question presented here was passed upon by the Supreme Court of New York, and it was there held that a contract by one confined in the penitentiary for life is valid: the contract in question being an agreement to pay an attorney's fee of \$1,000 for services in obtaining a pardon or commutation of sentence. In the body of the opinion the court said:

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"The very instructive opinion delivered in the case of *Avery v. Everett* (cited *supra*) 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264 [6 Am. St. Rep. 268], where the status of a life convict was involved, would appear to afford authority for the proposition that a person 'civilly dead' may still dispose of his property by will or by deed, and this during the period of the civil death. So, too, he may make a valid contract for the breach of which his estate would be answerable, although, on his side, the contract could not be enforced with the aid of the courts."

Also, in the case of *Martin v. Territory*, 14 Okla. 603, 78 Pac. 89, involving the question of the competency of the person who had been sentenced to life imprisonment to testify, and where counsel urged the provision of statute that a person sentenced to imprisonment in the territorial prison for life is thereby deemed civilly dead, the court held that he was a competent witness, and said:

"The statute on which appellant relies has no application to the right of such a person to testify as a witness, but applies to other civil rights. Section 4209 of our statutes provides: 'No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime, but such interest or conviction may be shown for the purpose of affecting his credibility.'"

Section 2955, Rev. Laws 1910, provides:

"Besides the personal rights mentioned or recognized under the law, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations."

Our statutes further provide that a person convicted of felony may be sued for a divorce or prosecuted for a crime committed while under conviction, all of which goes to show he is not to be regarded as absolutely *civiliter mortuus*. Besides, the right of a convict, while under sentence to confinement in the penitentiary, to apply for writ of *habeas corpus*, for pardon, or parole, has been universally recognized by the courts of our state. All of which goes to show the tendency of our laws to not interfere with or abridge those natural rights, the exercise of

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which do no detriment to society nor harm to the liberal spirit of our positive laws. Besides, section 18 of our Constitution (section 10, Williams' Ann. Const. Okla.) provides:

"The privilege of the writ of *habeas corpus* shall never be suspended by the authorities of this state."

This therefore would constitute express authority to apply for a writ of *habeas corpus* at any time, and, if a convict be authorized to sue for a writ of *habeas corpus* at any time he may deem himself unlawfully restrained of his liberty, it logically follows that he has the right to contract for the prosecution of his writ. The right to such a writ or the right to petition for a pardon or parole would be an absolute nullity unless it carried with it the right to contract for the prosecution of same, and especially so in the absence of some express statute providing for the disposition of his property, or providing for a trustee to manage his estate and represent his interests. We think, therefore, it is the evident intention of our law and in harmony with the spirit and policy of our state government to allow a convict to contract with an attorney to procure his liberty, whether he is to be represented in obtaining a pardon, a parole, or a discharge under a writ of *habeas corpus*. The law is stated in 9 Cyc. p. 874, thus:

"By the great weight of authority, offenders, whether or not sentenced to state prison for life or for a term of years during which their civil rights are suspended, are still liable to be sued, and this liability necessarily carries with it the right to defend."

This has been held in California, Delaware, Kentucky, Nevada, New Jersey, New York, Pennsylvania, and Virginia.

Now, if a convict be authorized to contract for his defense, it is by reason of his having power to convey or incumber his own private property in order to carry out his contract, and, if he has power to contract for one thing and to convey or incumber his property in such instance, we can see no reason, in the absence of an express statute to the contrary, or in the absence of some express provision for the management of his estate, for holding that he cannot exercise his personal inherent right of incumbering or conveying his own private property, nor for holding that such conveyance or incumbrance is invalid. When

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a person is convicted of a felony, he is deprived of his political rights, such as the right of suffrage, the right to hold office and to participate in the affairs of government, and, besides this, he is deprived of his liberty to roam at large, and of his time and the benefits of his own labor, which are forfeited to the state, and he is subjected to such prison regulations as are necessary to enforce the penalties of the law. And, upon obtaining a parole, in the absence of express restrictions, he is restored to his liberty to go at large and to his natural right to the fruits of his own labor so long as he lives up to the conditions of the parole. This would logically carry with it the right to make contracts and to acquire and dispose of his own private property.

Hence we believe the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

NORMAN MILLING & GRAIN CO. v. BETHUREM.

No. 2994. Opinion Filed February 3, 1914.

On Rehearing April 4, 1914.

(139 Pac. 830.)

1. **MUNICIPAL CORPORATIONS—Control of Streets—Discretion.** A city has power of control over its streets, including spaces occupied by trees and wires thereon, but must act in good faith, and not abuse its exercise of this power.
2. **SAME—Streets—Rights of Abutting Owners—Injury to Trees.** An abutting lot owner has an equitable easement in trees grown by him on a street, notwithstanding fee in city, which will enable him, as such special owner, to maintain action for wrongful injury thereto, depreciating value of such lot.
3. **SAME—Occupancy—Mutual Rights.** Both owner of abutting lot having an equitable easement in trees on street and owner of wires thereon may be in lawful occupancy of a street; and, in such case, mutual and reasonable accommodation is due from each to the other.
4. **SAME—Right of Abutting Owner—Injury to Trees.** Ordinarily, an abutting lot owner growing trees on a street is a potential occupant of sufficient space, in addition to that actually occupied, for the perfection of the growth of such trees, and, without due

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compensation, cannot be excluded from any portion or other space to give exclusive occupancy to an owner of wires other than the city; and an owner of wires thereafter voluntarily occupying such space is not entitled, without due compensation, to injuriously trim such trees to sever or prevent contact with wires.

5. **SAME.** Ordinarily an owner of wires, voluntarily strung within space already potentially occupied by trees grown by the abutting lot owner, who injuriously cuts back such trees from contact with such wires is a trespasser *ab initio* and liable to the abutting lot owner for all the consequential damages to his lot.
6. **SAME—Rights of Occupancy.** Only public necessity, as contradistinguished from necessity of private owner of trees or wires, will justify the city's compulsion, and only the latter will justify either such owner in excluding the other from space first rightfully occupied by such other by trees or wires on the street.

(Syllabus by Thacker, C.)

Error from District Court, Cleveland County;

R. McMillan, Judge.

Action by E. A. Bethurem against the Norman Milling & Grain Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed. On rehearing former opinion adhered to.

B. F. Williams and Munden & Horton, for plaintiff in error.

W. M. Newell and Jackson & Eagleton, for defendant in error.

Opinion by THACKER, C. Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

In August, 1909, and at all times since about January, 1903, defendant, a public service corporation, owned and operated electric current wires strung about $24\frac{1}{2}$ or $26\frac{1}{2}$ feet above the ground, and almost immediately over the center of the tops of certain black locust trees, about seventeen or eighteen in number, in a parking on a street in the city of Norman; and plaintiff, the abutting lot owner, having, in about 1896, set and since cultivated these trees, had whatever interest in them these facts and the act of March 2, 1905, together impart to her; but prior to and without regard to this act, she, as abutting lot owner and

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grower of the trees, notwithstanding the fee-simple title to the street was in the city (*City of Guthrie v. Nix*, 5 Okla. 555, 49 Pac. 918; *Blackwell, Enid & S. W. Ry. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889; *McKay v. City of Enid*, 26 Okla. 275, 108 Pac. 520, 30 L. R. A. [N. S.] 1021; and, also, as a complement of the rule, see section 610, St. Okla. 1890, the same being section 588, Rev. Laws 1910), which was also the general owner of the trees (*Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311), had and has such equitable easement in and special ownership of the trees as to entitle her to bring and maintain an action for wrongful injury to them resulting in consequential injury to and depreciation in value of her abutting lot. At the time defendant's wires were strung (January, 1903), these trees were small and their tops far from interfering; but, in August, 1909, as a result of about six years' additional growth, they came in contact with and extended some seven or nine feet above the wires, and thus presented a condition requiring severance and precautions against recurrence of contact, unless it was feasible to so insulate the wires and so protect such insulation as to thus afford protection to the trees, wires, and users of the streets from injury resulting from such contact, which does not appear. At that time (August, 1909), defendant cut off the tops and some of the branches of these trees, cutting off some ten or twelve feet of the tops, and cutting the branches back in some instances to where they were an inch or more in diameter. The act of cutting was without regard to avoidance of exposure of cut ends of branches to weather, and without regard to immediate injury to stubs, the branches being hacked, and in some instances so as to leave a forked cut; and, in deference to the verdict of the jury, at least, we may say that as a result, these trees fell into a state of progressive deterioration in health which, at the time of the trial, had resulted in the death of one or two and, perhaps, presaged the death of others.

Plaintiff brought this action and recovered \$100 as her damages for the consequential injury to and depreciation in value of her abutting lot, and the defendant attempted to justify the cutting by showing, but the trial court, upon objection made,

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did not permit it to show, that on January 10, 1903, by virtue of its due acceptance at that time of an ordinance enacted by the city of Norman on December 2, 1902, and which had been duly published, it acquired and has since had a franchise incidentally purporting to authorize it to so cut the tops and branches of trees. The terms of this ordinance granted to the defendant a franchise for 21 years, "with full right, power and authority to erect, maintain, extend and operate a plant of machinery, poles, wires and all other apparatus and appliances within the corporate limits of the city of Norman, for the purpose of generating and furnishing to the city of Norman and its inhabitants electricity for light, heat and power, and for said purpose to enter upon and use the streets, alleys and public grounds of said city, and place and maintain thereon such poles, wires, apparatus and appliances as may be necessary and proper, and shall have the right to trim trees to prevent branches from coming in contact with wires and to remove such trees when necessary for the proper placement and maintenance of same, subject to the terms and conditions hereinafter provided." Another section of this ordinance provides "that said poles and wires shall be erected and placed under the direction of the city care and erect poles and wires in places wherein said grantee [the defendant] shall deem necessary." The ordinance does not limit defendant to such precise place for poles or wires as would have prevented the stringing of the wires higher or more to one side of the trees, or elsewhere than in the parking, nor, perhaps, would any public purpose which would justify cutting the trees be apparent therefrom if such limitation had been imposed, and the defendant strung its wires so as to occupy a space well within that which should at the time reasonably have been anticipated as necessary for perfection in the growth of plaintiff's trees. It appears that the defendant, in stringing its wires, both voluntarily and unnecessarily invaded space which at that time must reasonably have been anticipated as necessary for the perfection of the growth of the trees, and thus potentially occupied by their grower, the plaintiff. The court treated defendant as a trespasser *ab initio* upon proof of the foregoing state of facts.

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and instructed the jury in effect that, if plaintiff was damaged, she was entitled to recover as such damages the difference between the value of her lot before and its value after the cutting.

It is here contended by defendant that it was not a trespasser *ab initio*, and that the true measure of damages, if any, is the depreciation in the value of the plaintiff's lot by such trimming as was not reasonably necessary to sever the contact of trees and wires and keep them apart, if there was any such trimming, or, in other words, the difference between the value of the lot with the trees trimmed so far as reasonably necessary and its value with the trees trimmed as they were, if such trimming went beyond what was proper and necessary.

The widely divergent views of the courts and authors of text-books upon the question of the rights and duties of owners of trees and owners of wires upon the same street, under authority, express or implied, from the city, and of the liability of the latter owners for damages to the former for cutting back such trees, to sever or prevent contact with the wires, are well illustrated by the following citations: *Moore v. Carolina Power & Light Co.*, 163 N. C. 300, 79 S. E. 596; *Southwestern Telegraph & Telephone Co. v. Branham* (Tex. Civ. App.) 74 S. W. 949; *St. Paul Realty & Assets Co. v. Tri-State Telephone & Telegraph Co.*, 122 Minn. 424, 142 N. W. 807; *Slabaugh v. Omaha Electric Light & Power Co.*, 87 Neb. 805, 128 N. W. 505, 30 L. R. A. (N. S.) 1084; *Rosenthal v. City of Goldsboro*, 149 N. C. 128, 62 S. E. 905, 20 L. R. A. (N. S.) 809, 16 Ann. Cas. 639; *Commonwealth of Mass. v. Byard*, 200 Mass. 175, 86 N. E. 285, 20 L. R. A. (N. S.) 814; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *Cartwright v. Liberty Tel. Co.*, 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, 12 Ann. Cas. 249; *Osborne v. Auburn Telephone Co.*, 111 App. Div. 702, 97 N. Y. Supp. 874; *Barber v. Hudson River Tel. Co.*, 105 App. Div. 154, 93 N. Y. Supp. 993; *Nichols v. N. Y. P. T. & T. Co.*, 126 App. Div. 184, 110 N. Y. Supp. 325; *Meyer v. Standard Tel. Co.*, 122 Iowa, 514, 98 N. W. 300; *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639; *Cumberland Tel., etc., Co. v. Cassedy*, 78 Miss. 666, 29

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South. 762; *McAntire v. Joplin Telephone Co.*, 75 Mo. App. 535; *Wyant v. Cen. Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 47 L. R. A. 497, 81 Am. St. Rep. 155; *Van Siclen v. Jamaica Electric Light Co.*, 45 App. Div. 1, 61 N. Y. Supp. 210; *Southern Bell Telephone & Telegraph Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; *Bradley v. Southern New England Tel. Co.*, 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; *Southern Bell Telephone & Telegraph Co. v. Constantine*, 61 Fed. 61, 9 C. C. A. 359, 23 U. S. App. 56; *Tissot v. Great Southern Telegraph & Telephone Co.*, 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248; *Memphis Bell Telephone Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; *Stephens & Transp. Co. v. W. U. Telegraph Co.*, Fed. Cas. No. 13,371, 8 Ben. 502; *Board of Trade Telephone Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453. Also see: *Telegraph & Telephone Companies*, by Jones, sec. 128; 37 Cyc. 1642, 1643; and 28 Am. & Eng. Enc. L. (2d Ed.) 540; *The Law Relating to Electricity*, by Croswell, sec. 209; *McQuillin, Municipal Corporations*, sec. 1652, p. 3473; *Id.*, sec. 1326; *Jaggard on Torts*, p. 143; *Roads & Streets*, by Elliott, sec. 806.

Our own conclusions are as follows:

First. Subject to the requirement that it must act in good faith and not abuse its exercise of power, a city has the power of control over its streets, including the parkings and all spaces occupied by both the trees and wires thereon; and this power is paramount to any right that either the grower of trees or the owner of wires may acquire thereon. Sections 586-591, St. Okla. 1890, found with some amendments in sections 572-575, Rev. Laws 1910; 28 Cyc. 851, 947, 953; *McQuillin, Municipal Corporations*, sec. 1327; *Robinson et al. v. City of Spokane*, 66 Wash. 527, 120 Pac. 101, 28 Ann. Cas. 1012; *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E. 905, 20 L. R. A. (N. S.) 809, 16 Ann. Cas. 639; *Frostburg v. Wineland*, 98 Md. 239, 56 Atl. 811, 64 L. R. A. 627, 1 Ann. Cas. 783; *Wright v. Austin*, 143 Cal. 236, 76 Pac. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97.

Second. An abutting lot owner, even though the fee of the street and general ownership of the trees be in the city, has.

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without the aid of statute, an equitable easement, and therefore a special ownership, in the trees which will enable him to maintain an action for wrongful injury thereto which depreciates the value of his lot. *McQuillin, Municipal Corporations*, sec. 1326; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549; *Adams v. Syracuse Lighting Co.*, 137 App. Div. 449, 121 N. Y. Supp. 762.

Third. As stated in *St. Paul Realty & Assets Co. v. Tri-State Telephone & Telegraph Co.*, *supra*, decided July 11, 1913, by the Supreme Court of Minnesota:

"Both the company and the landowner may be in lawful occupancy of the street. The abstract right of neither can be said to be superior, and each must be regardful of the rule that property rights must be so exercised as not unnecessarily to impinge upon, interfere with, or impede those of another."

In such case, mutual and reasonable accommodation is due from each to the other; and slight injury to trees by necessary and reasonable trimming cannot be made the predicate of an action where the wires are rightfully in position and their owner has not voluntarily, or to any considerable extent, invaded space first actually or potentially occupied by the special owner of trees growing on the street when the wires were strung.

Fourth. Ordinarily such special owner of trees may neither be excluded from the occupancy of such space as her trees actually occupy, or such additional space as should be reasonably anticipated as necessary for their perfection in growth as is thus potentially occupied by them to make room for the exclusive occupancy of such space, or any part thereof by the owner of wires, other than the city itself; and if such owner of wires within such space cuts back the trees to sever or prevent their contact with the wires, and thus injures the trees and depreciates the value of the abutting lot of such special owner, the latter is entitled to and may recover damages therefor. •

Fifth. Only where public necessity, as contradistinguished from any necessity of either the private owner of the trees or the private owner of the wires, justifies such an act may the city authorize either such private owner to invade and exclude the

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other from space first rightfully and actually or potentially occupied by the other, and so inflict any substantial injury or damage upon such other, without due compensation.

Sixth. A necessity for trimming trees resulting from the voluntary stringing of wires by defendant within the space which it must, at the time, have anticipated would be and which was required for the perfection of the growth of the trees is a necessity for which defendant is blamable and cannot be urged as justification of any substantial injury to the trees.

The burden of proof was, of course, upon plaintiff to make at least a *prima facie* case of liability against defendant; but it appears from the foregoing statement of facts that she has done this, and the said ordinance of the city purporting to authorize defendant to trim trees would not justify the trimming nor constitute a defense against the recovery of the actual damages given.

Tested by the foregoing observations, it does not appear that there is any reversible error in the trial of this case in the court below; and the judgment of that court should be affirmed.

By the Court: It is so ordered.

ON REHEARING.

We have examined the several propositions urged in petition for rehearing without discovering any sufficient reason for change in the conclusions heretofore reached.

In respect to the principal question in the case, it is but a reiteration of the view heretofore expressed, with only slight change in form, to say that a right to occupy a street for the purpose of putting in position and maintaining posts and electric current wires does not include the right to occupy each and every portion of such street, and the defendant violated the rule of "mutual accommodation" announced in the opinion heretofore handed down in this case. If the city of Norman had limited defendant's right to that particular space and portion of the street which was necessary for the perfection of the growth of plaintiff's trees, the question as to whether the city had acted in bad faith and had abused its exercise of power would still remain

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for determination before this case could be reversed; but there was no compulsion by the city in this regard, and there was no necessity for trimming these trees unless made by the voluntary and wrongful act of the defendant in setting its posts and stringing its wires where it did.

In our opinion the petition for rehearing should be denied, and there should be adherence to the original opinion.

By the Court: It is so ordered.

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No. 2998. Opinion Filed February 28, 1914.

On Rehearing April 7, 1914.

(139 Pac. 964.)

1. **COUNTIES—Proceedings of County Board.** Where the law prescribes the mode which boards of county commissioners must pursue in the exercise of their powers, it, as a rule, excludes all other modes of procedure.
2. **BRIDGES—Contracts—Validity—Counties.** Under section 4, art. 1, c. 29, Sess. Laws 1903, advertisement and opportunity for competitive bids were essential to a contract under which a county was authorized to pay for the construction of bridges; and any agreement between the board of county commissioners and a bidder for the construction of bridges without such advertisement and opportunity for competitive bids, and in willful violation of the provisions of such section, was fraudulent and void.
3. **SAME—Alteration of Contract—Validity—Counties.** A valid contract for bridges, according to properly specified plans and specifications, under section 4, c. 29, Sess. Laws 1903, could not, without readvertisement and statutory opportunity for competitive bids, be thereafter changed, by agreement between the board of county commissioners and the accepted and contract bidder purporting to substitute other plans and specifications for those specified in the contract, so that the bridges may contain less and lighter material, and be of less value and first cost for the sole benefit of such bidder; and such agreement for such substitution is fraudulent and void.
4. **INJUNCTION—Subjects of Relief—Issuance of County Warrant.** A county clerk may be enjoined from issuing a warrant for payment of a claim allowed by the board of county commissioners for the construction of bridges under a void contract between such board and the claimant.

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5. **SAME—Parties—Counties.** Section 1649, St. Okla. 1893 (section 1500, Rev. Laws 1910), requires all suits by a county to be in the name of its board of county commissioners, except where officers are authorized by law to sue in their official names for the benefit of the county.
6. **SAME.** A county attorney is not authorized to sue in his official name to enjoin the issuance of warrants as compensation for the construction of bridges under a void and fraudulent contract.
7. **SAME—Expenditure of Funds—Parties.** A county of the territory of Oklahoma was a subdivision thereof for public and political purposes, and such territory had sufficient interest to enable it to maintain suits to enjoin the officers of its counties from violation of trusts committed to their hands.
8. **SAME.** A county attorney, prior to statehood, was authorized to sue in the name of the territory of Oklahoma to enjoin the county clerk of his county from the issuance of warrants for the misapplication of county funds.
9. **APPEAL AND ERROR—Review—Amendments Regarded as Made—Parties.** Where a county attorney, as such, has sued for the benefit of the territory of Oklahoma to prevent the misapplication of county funds by its officers, without naming such territory as the plaintiff, where the cause of action, the issues made by the pleadings, the scope of the evidence for each of the parties, and the issues made thereby, and the relief given by the court, are clearly what they would have been if the suit had been in name, as it was in fact, by said territory, on the relation of such county attorney, and where no substantial right of the adverse party is affected to his prejudice, the petition will be treated as if here amended in the name of the proper party plaintiff.
10. **VESTED RIGHTS—Harmless Error.** Under the statutes of the territory of Oklahoma there was no such thing as a vested right in a harmless technical error, or defect in the pleadings and parties to an action.
11. **APPEAL AND ERROR—Harmless Error—Parties.** Under section 4018, St. Okla. 1893 (section 4791, Rev. Laws 1910), this court must disregard every error or defect which does not affect the substantial rights of the adverse party.

ON REHEARING.

12. **BRIDGES—Retroactive Laws—Reconstruction and Repair.** Under section 52, art. 5 (section 142, Williams'), Constitution of Oklahoma, a cause of action to enjoin issuance of county warrant upon claim theretofore allowed by the board of county commissioners in payment for bridges built in places of county bridges recently, in respect to time new bridges were built, destroyed by floods on principal streams of a county, without advertisement or opportunity for competitive bids, as required by section 4, art. 1, c. 29, Sess. Laws 1903, where suit thereon had been commenced, is not affected by a subsequently enacted statute (section 1, art. 4, c. 32, Sess.

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Laws 1909), providing that "the board of county commissioners of any county in this state is hereby authorized to pay for the reconstruction or repairing of such county bridges as have been heretofore damaged or destroyed by floods, and including bridges where the same by reason of an emergency have been repaired or reconstructed by any person or persons without first having contracted to repair or reconstruct the same with said county commissioners: Provided, the authority granted by this section shall apply only to claims for repairing or reconstructing bridges previously owned by the county on the same site."

(Syllabus by Thacker, C.)

Error from District Court, Noble County;
W. M. Bowles, Judge.

Action by Charles R. Bostick, County Attorney of Noble County, against Joseph E. Dolezal, County Clerk of said county, and Henry Freygang and A. A. Trocon, a copartnership doing business in the name of the Midland Bridge Company, for injunction. Temporary injunction made permanent, and defendants bring error. Affirmed.

Harris & Nowlin and *Kenneth C. Crain*, for plaintiffs in error.

Charles R. Bostick, for defendant in error.

Opinion by THACKER, C. Plaintiffs in error will be designated as defendants and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On August 17, 1906, after due advertisement and upon the lowest of nine bids received, the board of county commissioners of Noble county entered into a valid and binding contract in conformity with the provisions of section 4, art. 1, c. 29, Sess. Laws 1903, the same being section 7861, Comp. Laws 1909 (Rev. Laws 1910, sec. 7441), with the Midland Bridge Company, one of the defendants, whereby this defendant undertook to construct three bridges across principal streams in Noble county, in accord with plans and specifications prepared by the county surveyor as required by said section 4, and then on file in the office of the county clerk of said county, at an agreed price of \$7,995; but on about September 3, 1906, without advertising, or any man-

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ner of attempt to comply with the provisions of said section 4, and in the absence of other bidders, the defendant bridge company and the board of county commissioners agreed to substitute other and different plans and specifications prepared and proposed by defendant for those of the said contract of August 17, 1906, whereby the material to be used in the bridges was to be less and lighter, and in effect the value and first cost of the bridges were to be reduced, without any reduction in the price to be paid therefor by the county, of which price the county was to pay 50 per cent. on delivery of metal, 25 per cent. on delivery of lumber, and 25 per cent. on completion of bridge.

It is contended in effect by defendants that, after the contract of August 17, 1906, the defendant bridge company discovered it was short on material called for in the plans and specifications of the contract, and that the said substitution of other plans and specifications for a bridge, with less and lighter material, was made because there was a pressing demand and need for the speedy completion of these bridges, which could be best met by such substitution, without explanation of omission of corresponding reduction in the price to be paid by the county; but, in deference to the judgment of the trial court, we must assume that the substitution of plans and specifications was not in fact, nor intended to be, for the benefit of Noble county, and was solely for the convenience and benefit of this defendant.

On September 14, 1906, the commissioners and the bridge company, without any attempt to comply with any provision of said section 4, and without any meeting of said board, entered into an agreement, purporting to be a contract, whereby the company was to construct three additional bridges across principal streams of said county in accord with the plans and specifications for the smallest and least expensive of the bridges called for by the plans and specifications of the former contract, at an agreed price of \$3,800, of which the county was to pay 50 per cent. when the metal was delivered, 25 per cent. when the lumber was delivered, and 25 per cent. when the bridges were completed; and it is claimed by defendants that these three additional bridges replaced three bridges immediately theretofore destroyed

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by floods, so that an emergency existed which required that the parties dispense with the delay and formalities of compliance with said section 4; but, without indicating that an emergency agreement would be upheld as a contract in the face of the statute, in deference to the judgment of the trial court, we must assume that no emergency existed. The six bridges were actually constructed by the bridge company; but they were not in any instance constructed as required by the original plans and specifications; and the differences between the bridges for which the contract of August 17, 1906, and the agreement of September 14, 1906, called for and the bridges actually constructed were as follows: First, as to the three bridges called for by the contract of August 17, 1906: A bridge which should have been 140 feet long, with tubes 30 feet long and 36 inches in diameter, with truss 9 feet high on main span and 6 feet high on approach, with 52 2-10 cubic yards of concrete, and containing 43,062 pounds of structural steel, was made 130 feet and 10 inches long, with tubes 30 feet long and 30 inches in diameter, with truss 8 feet 6 inches high on main span, and 5 feet high on approach, with 21 6-10 cubic yards of concrete, and containing only 34,103 pounds of structural steel; a bridge which should have been 150 feet long, with tubes 30 feet long and 36 inches in diameter, with truss on main span 9 feet high and 7 feet 6 inches on approach, with 33 4-10 yards of concrete, and containing 52,026 pounds of structural steel, was made 150 feet long, with tubes 25 feet in length and 30 inches in diameter, with truss 8 feet 6 inches high on main span and 6 feet on approach, with 19 8-10 yards of concrete, and containing only 43,978 pounds of structural steel; a bridge which should have been constructed with tubes, with 16 cubic yards of concrete, and containing 12,131 pounds of structural steel, was made with eyebeams instead of tubes, with 9 cubic yards of concrete, and containing only 9,976 pounds of structural steel; and, second, the three other bridges, being the ones to which the agreement of September 14, 1906, relates, were constructed with 10 cubic yards of concrete less than required by the plans and specifications therefor. It appears that the bridges actually constructed contained at least 19,162 pounds of

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structural steel and 72 cubic yards of concrete less than required by plans and specifications called for by the contract of August 17, 1906, and the agreement of September 14, 1906; and it further appears that structural steel was worth about 7½ cents per pound, and concrete \$8 per cubic yard, to which advantage gained by defendant should be added perhaps the saving of the freight charges and cost of construction on account of the omitted steel, as the record indicates that the price of 7½ cents per pound for steel may relate to that material before shipment for the purpose of being placed in bridges.

At the commencement of this action the warrants of Noble county had been issued and paid to the defendant bridge company to the amount of 75 per cent. of the \$11,795 which the commissioners had agreed to pay for the six bridges, leaving only a balance of \$2,948.75 unpaid; and, the reasonable value of the bridges as actually constructed not being shown, it does not appear whether such value had been thus paid. This action was by plaintiff, as county attorney of Noble county, against the defendant, Joseph H. Dolezal, as county clerk of that county, and the defendant bridge company, as claimant, to enjoin the clerk from issuing any warrant for any part of said balance of \$2,948.75 and the defendant bridge company from collecting same. A temporary injunction was issued immediately after the filing of the petition, and was continued in force until the final hearing in March, 1911, when the same was made permanent.

The provisions of said section 4, Sess. Laws 1903, were obviously intended to prevent just what occurred in the transactions between the board of county commissioners and the defendant bridge company, out of which this suit arose, *i. e.*, they were intended to insure the obtaining of the lowest possible bid for the construction of bridges, to prevent the letting of contracts for bridges to any but the lowest responsible bidder, and to prevent such frauds upon the counties as the evidence discloses was perpetrated in the present case upon Noble county; and, to this end, it required, as a prerequisite to a valid contract for the construction of any such bridges, advertisement by newspaper publication and by posting for four consecutive weeks for bids

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to construct the bridge in accord with plans and specifications prepared by the county surveyor and at the time on file in the office of the county clerk.

Where the law prescribes the mode which boards of county commissioners must pursue in the exercise of their powers, it, as a rule, excludes all other modes of procedure.

In the present case there appears to have been a deliberate, willful, flagrant, and inexcusable violation of the provisions of said section 4, for the sole benefit of the defendant bridge company at the great expense of the county; and the pretended contracts of September 3 and 14, 1906, under which the bridges were constructed, were fraudulent and void. *Allen et al. v. Board of Com'rs of Pittsburg County*, 28 Okla. 773, 116 Pac. 175; *National Drill & Mfg. Co. v. Davis*, 29 Okla. 625, 120 Pac. 976; *Garvin County v. Lindsay Bridge Co.*, 32 Okla. 784, 124 Pac. 324; *Harlow v. Board of Com'rs of Payne County*, 33 Okla. 353, 125 Pac. 449; *Salt Creek Twp. Lincoln County v. King Iron Bridge & Mfg. Co.*, 51 Kan. 520, 33 Pac. 303; *Venango County v. Penn Bridge Co.*, 215 Pa. 199, 64 Atl. 445; *Dawson v. Woodhams*, 11 Colo. App. 394, 53 Pac. 238; *Richardson v. Grant County* (C. C.) 27 Fed. 495; *Leflore County v. Cannon*, 81 Miss. 334, 33 South. 81; *Pacific Bridge Co. v. Clackamas County* (C. C.) 45 Fed. 217; *State v. Yeatman*, 22 Ohio St. 546.

We need only to refer to the case of *Harlow v. Board of Com'rs*, *supra*, as authority for the statement that an injunction is a proper remedy to prevent the issuance of warrants for the payment of the \$2,948.75 balance claimed by the defendant bridge company under these illegal and void contracts. But the plaintiff's authority and right to maintain this action is challenged both by demurrer and answer; and the question thus presented justifies our inquiry as to who may be a proper party to bring and maintain such an action.

Soon after the examination of the first witness was begun the question of amending the plaintiff's petition was discussed between the court and the plaintiff, and the following colloquy between the court and the plaintiff occurred:

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"By the Court: * * * But then there is no showing on that part as to whether or not you are still in office, I presume; go ahead, I hold that you have the right to bring the suit in behalf of the people as county attorney.

"By the Plaintiff: Well, it will be impossible for Mr. Cowley to bring the suit, because he is disqualified.

"By the Court: You could amend it in his name at the present time.

"By the Plaintiff: Well, I will ask leave at this time.

"By the Court: I don't know, they have not made any charge of that kind: that you are out of office or in office, or any other place; the allegation is that you are county attorney and they have not denied it.

"By the Plaintiff: It is admitted anyway."

The defendant remained silent as to the question discussed between the court and the plaintiff; and, as the record discloses no specific reference to the omission of the use of the name of either the territory of Oklahoma or the board of county commissioners as plaintiff, it appears that the alleged want of capacity in plaintiff of which defendant complains was perhaps understood by both the court and the plaintiff to relate to the question suggested by the foregoing colloquy. The statement of the court during the aforesaid colloquy, to the effect that Charles R. Bostick, as county attorney, had the right to prosecute the suit "in behalf of the people" without objection by either party, tends to show that it was then understood that said Charles R. Bostick, as county attorney, was merely a relator for the territory of Oklahoma in the case, and that an amendment of the petition specifically showing this might then have been made by him.

It appears indisputable that Noble county, in the name of the board of county commissioners, might have brought and maintained it. See sections 1646, 1648, and 1649, St. Okla. 1893, same being sections 1497, 1499, and 1500, Rev. Laws 1910; also *Harlow v. Board of Com'rs, supra*.

And, in the absence of a showing to the contrary, authority of the commissioners will be presumed when the suit is in their name. *Nolan v. St. L. & S. F. R. Co.*, 19 Okla. 51, 91 Pac.

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1128; *Burkett v. Lehmen-Higginson Grocery Co.*, 8 Okla. 84, 56 Pac. 856; *County of San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682.

It appears equally clear that any taxpayer of that county might have done so. See *Harlow v. Board of Com'rs*, *supra*; *Sexton v. Smith et al.*, 32 Okla. 441, 122 Pac. 686; *Bowles v. Neeley, Mayor, et al.*, 28 Okla. 556, 115 Pac. 344; *Hannan v. Board of Education*, 25 Okla. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214; *Kellogg v. School Dist. No. 10*, 13 Okla. 285, 74 Pac. 110. But this suit is not brought in the name of the board of county commissioners, nor does it appear, either by allegation or proof, that the plaintiff was a taxpayer of the county.

The right of the plaintiff, as county attorney, to maintain this action depends upon whether there is statutory authority for him, as such and in his own official name, to bring and maintain the same. We assume that plaintiff's description of himself as county attorney, when considered in connection with the nature and character of the action, justifies the construction of the petition as a suit by plaintiff *as county attorney* and not merely as an individual, although it is not specifically alleged that he does sue as such.

Section 1646, *supra*, reads:

"Each organized county within this territory shall be a body corporate and politic and as such shall be empowered for the following purposes: First. To sue and be sued. * * *"

Section 1648, *supra*, reads:

"The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners."

Section 1649, *supra*, reads:

"In all suits or proceedings by or against a county, the name in which a county shall sue or be sued shall be 'Board of County Commissioners of ———,' but this provision shall not prevent county officers, where authorized by law, from suing in their name of office for the benefit of the county."

The words "where authorized by law," as used in section 1649, *supra*, and in respect to the county attorney, probably refer to such specific authorization as is found in the statutes making

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it the duty of the county attorney to sue without regard to the board of county commissioners.

There appears to be no general statute, nor any specifying such cases as the present one, in which the county attorney is "authorized by law" to sue "for the benefit of the county," unless in section 1765, St. Okla. 1890 (section 1554, Rev. Laws 1910). It seems clear that this section (1765) when construed in connection with sections 1646, 1648, and 1649, *supra*, merely requires that the county attorney shall serve his county as counsel and attorney at law, and does not authorize him to exercise any of the powers of the same as a "body corporate and politic," which powers section 1648, *supra*, expressly declared shall be exercised by its board of county commissioners.

Said section 1765, except as to name of the office, is identical with and was probably taken from section 428, art. 3, c. 8, Political Code Comp. Laws of Dakota 1887; and, in the case of *Hughes County, S. D., v. Ward* (C. C.) 81 Fed. 314, where this section of the Comp. Laws of Dakota, and section 591, *Id.* (the latter section providing that the commissioners "shall have power to institute and prosecute civil actions in the name of the county, for and in behalf of the county") are considered, it is said:

"I am of the opinion that the authority of the state's attorney in this regard was limited to prosecuting and defending suits already instituted by or against the county, and that he exceeded his power when he brought this action without a lawful direction to do so by the board of county commissioners of Hughes county."

In *Kerby v. Board of County Com'rs*, 71 Kan. 683, 81 Pac. 503, the same view was taken, where all the statutes relating to this subject (sections 1611, 1613, 1615, and 1796, Gen. Stat. 1889, Kan.) are identical with our own except section 1796, *Id.*, prescribing the duty of the county attorney which, though in substance the same as our own, reads as follows:

"It shall be the duty of the county attorney to appear in the several courts of their respective counties, and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested."

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However, in *Board of Education v. Territory ex rel. Taylor*, 12 Okla. 286, 70 Pac. 792, and in *State ex rel. Huston, Judge*, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380, it is held in effect that the county attorney may, upon his own initiative, in the name of the state, bring suit to enjoin territory or state officers, other than the Governor, from misapplying public funds; and the statutory warrant for this holding is found in said section 1765, St. Okla. 1890, which reads as follows:

"It shall be the duty of the county attorney of the several counties to appear in the district courts of their respective counties and prosecute and defend, on behalf of the territory, or his county, all actions or proceedings, civil or criminal, in which the territory or county is interested or a party. * * *"

No reason can be found in the language of this or any other section of the statute for admitting the authority of the county attorney, as such, and upon his own initiative, to sue in the name of the territory to enjoin territorial officers from misapplying territorial funds and denying him the authority to do so to enjoin county officers from misapplying the funds of the county; and this section is the only authority for such suit in either case.

Indeed, it appears that it has been uniformly held under the Kansas statute (section 1796, *supra*) that the county attorney, upon his own initiative may, in the name of the state, bring and maintain such suit to prevent the misapplication of county and even city funds. *State ex rel. Reed, Co. Atty., v. Com'rs of Marion County et al.*, 21 Kan. 308; *County of Harvey v. Munger*, 24 Kan. 150, opinion at page 153; *State ex rel. Lewis, Co. Atty., v. Eggleston et al.*, 34 Kan. 714, 10 Pac. 3. Also *State ex rel. Miller, Co. Atty., v. City of Kansas City*, 60 Kan. 518, opinion at page 525, 57 Pac. 118, opinion at pages 120-121; *Sedgwick County v. State ex rel. Atty. Gen., etc.*, 66 Kan. 634, opinion at page 637, 72 Pac. 284, opinion at page 285; *State ex rel. Faulkner, Co. Atty., v. Board of Com'rs of Cowley County et al.*, 86 Kan. 201, 119 Pac. 327.

"A county is a territorial subdivision of the state created for public and political purposes connected with the administration of the state government." (*Frantz v. Autry*, 18 Okla. 561, 91 Pac. 193, and *Stone v. Reynolds*, 7 Okla. 397, 54 Pac. 555.)

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And the authorities hereinbefore cited show that the state has sufficient interest in preventing violations of the trust committed to the hands of the officers of its counties to bring and maintain such a suit as the plaintiff has brought in the present case.

In the case of *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 52 L. Ed. 355, where plaintiff in the first instance sued in her individual capacity and was allowed more than two years thereafter to amend so as to sue in her capacity as administratrix, the court said:

"It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. * * * The change was in form rather than in substance. *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537."

Also see *American Ry. Co. of P. R. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879.

In *McDonald v. State of Nebraska*, 101 Fed. 171, 41 C. C. A. 278, it is said:

"Under the Code in Nebraska there is no such thing as a vested right in a technical error or defect in the pleadings or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party. Whether the judicial demand upon the bank and its receiver to repay to the state the money of the state which the bank had received and retained should be made in the name of the state * * * in his official capacity was purely a technical legal question, which in no wise related to the merits of the cause of action. The cause of action was not changed in the slightest degree by substituting the state of Nebraska as plaintiff in place of the treasurer of the state."

And we think the same is true under our own statutes. See section 5679, Comp. Laws 1909 (section 4790, Rev. Laws 1910); section 5680, Comp. Laws 1909 (section 4791, Rev. Laws 1910).

In *Howard v. United States*, 102 Fed. 77, 42 C. C. A. 169, it is held:

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"The fact alone that an action was brought in the name of the wrong party as plaintiff is not ground for reversal, but the appellate court will direct the substitution of the proper party."

In the opinion in *Braker v. Deuser*, 49 Pa. Super. Ct. 215, decided in 1912, it is said:

"Objection is made that the action is brought in the name of the husband and agent of the owner, and not in her own name. It was a mistake to include the name of the agent as the right of action was in the wife. The acts of her husband in collecting the rent are recognized and ratified, however, as she only claims for the period for which rent was not paid. The declaration sets forth a cause of action very clearly as a right existing in Fannie Braker, and the question passed on was whether she was entitled to recover rent. An amendment of the record might have been made in the court below, for in the pleadings Fannie Braker was the party whose right was being enforced, so an amendment would have been clearly within the rule stated in *Adams v. Edwards*, 115 Pa. 211 [8 Atl. 425], and such amendment should be considered as having been made in the court below, or in this court when the case was fully heard and no right of the defendant abridged. The objection is technical and formal, and insufficient, in the present state of the record, to justify a reversal. *Com. v. Mahon*, 12 Pa. Super. Ct. 616."

Also see following cases: *Hurst v. Brennen et al.*, 239 Pa. 216, 86 Atl. 778; *Elmore v. McCrary, Adm'r*, 80 Ind. 544; *Krutz et al. v. Howard*, 70 Ind. 174; *Mee v. Fay*, 190 Mass. 40, 76 N. E. 229; *Hill v. Reed*, 23 Okla. 616, 103 Pac. 855; *Carson v. Vance*, 35 Okla. 584, 130 Pac. 946; *Kaufman v. Bois-mier et al.*, 25 Okla. 252, 105 Pac. 326.

In the case of *Missouri, K. & T. Ry. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383, it is stated:

"Were no question presented to us save the naked legal proposition of the right to substitute or make new parties pending an appeal, and the facts connected therewith were admitted, we would be greatly disposed to grant the motion * * *"
—but in that case there were questions of fact to be determined before any necessity could arise to determine whether such substitution might be made on appeal, or how the same should be made, which of itself differentiates it from the present case.

If the name of the state should be substituted for that of the county attorney as the plaintiff, the original plaintiff, the

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county attorney, would continue to be the relator, and suit would continue to be for the benefit of the same party plaintiff.

We cannot, of course, direct the substitution of the board of county commissioners as plaintiff, as we have not so much as a request for such substitution as evidence of authority from that board to do so; and we cannot substitute a plaintiff without authority to do so. But may we not properly direct or permit the substitution of the state of Oklahoma as successor to the territory of Oklahoma, on the relation of the present county attorney of Noble county, Okla., or treat such amendment as having been made? And should we not do this? This action was immediately beneficial to the county, but was necessarily brought for the benefit of the territory, of which that county was a subdivision, "for public and political purposes connected with the administration of the territorial government," and, technically speaking, the plaintiff, as county attorney, and upon his own initiative and authority, could only have brought it in the name of the territory of Oklahoma. The issues and evidence, the cause of action and the relief sought, appear to have been just what they would have been in respect to the merits of this suit if the suit had been brought in the name of the territory on the relation of the county attorney; and it appears that plaintiff will suffer no wrong and lose no substantial right if a substitution of the state, on relation of the county attorney of Noble county, be directed, or if such amendment be treated as having been made in the court below or here.

Section 4018, St. Okla. 1893 (section 4791, Rev. Laws 1910), reads:

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Under this section of our statute, should we not disregard such defect in form as the omission of the petition to specifically name the territory of Oklahoma as the plaintiff and to show, by express and specific averment, that the county attorney is the relator for that plaintiff, when all this otherwise appears and is beyond question?

Opinion on Rehearing.

In our opinion this court, in deference to section 4018, *supra*, should treat the pleadings as amended so as to show that the territory of Oklahoma, on the relation of the county attorney, was the plaintiff in this action; and the judgment of the trial court should be affirmed.

ON REHEARING.

It is urged in the petition for rehearing that the record does not justify our statement in the original opinion that "in deference to the judgment of the trial court, we must assume that no emergency existed," and that payment for the three bridges built under the agreement of September 14, 1906, was authorized by section 1, art. 4, c. 32, Sess. Laws 1909, which reads as follows:

"The board of county commissioners of any county in this state is hereby authorized to pay for the reconstruction or repairing of such county bridges as have been heretofore damaged or destroyed by floods, and including bridges where the same by reason of an emergency have been repaired or reconstructed by any person or persons without first having contracted to repair or reconstruct the same with said county commissioners; provided, the authority granted by this section shall apply only to claims for repairing or reconstructing bridges previously owned by the county on the same site."

Section 52, art. 5 (section 142, Williams' Ann. Ed.), Constitution of this state, reads:

"The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

In our opinion, this provision of the Constitution clearly preserves to plaintiff its right to maintain its suit to enjoin the payment of the unpaid balance of \$2,948.75, notwithstanding the subsequent enactment of section 1, *supra*. Even if it be conceded that said section does not require action of the board of county commissioners, expressly finding all the essential facts, and also allowing claim for payment since the enactment thereof, and that it authorizes payment for such bridges as were recon-

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structed or repaired before its enactment, under an agreement with the board of county commissioners made in violation of the provisions of section 4, art. 1, c. 29, Sess. Laws 1903 (section 7861, Comp. Laws 1909), which we do not decide, and even if it be further conceded that an emergency existed when said agreement was made, this section of the Constitution saves to plaintiff the right adjudged below. But, advertting to the said statement in the original opinion of which defendants complain, it seems that this section 1 of the act of 1909 should be construed with and as in the nature of an exception to the general rule established by the provisions of said section 4, which makes advertisement and opportunity for competitive bids essential to a contract under which a county may pay for a bridge; and we think in the present case the burden was upon defendants to plead, as they did, and to prove, which they did not, such an emergency as made it necessary to dispense with advertisement and opportunity for bids, so we may at least say that there was no evidence of any emergency which would, if suit had not been commenced, bring these three bridges within the purview of the provisions of section 1, *supra*, and that the trial court so found. There was apparently no order of the board of the county commissioners declaring an emergency, and no evidence as to the necessities of public travel in respect to the roads upon which the bridges were built, except that they were mail routes, nor in respect to whether the streams were fordable at any convenient place, nor that one of these bridges replaced a bridge owned by the county, nor can we say with due deference to the judgment that the county commissioners had not sufficient time after the old bridges were destroyed in which to have complied with the requirements of said section 4 before September 14, 1906, in view of the fact that there was no more definite evidence in this regard than proof of the fact that the old bridges had "recently" been destroyed.

We deem it unnecessary to discuss any other proposition urged in the petition for rehearing.

The petition should be denied, and there should be adherence to the original opinion.

By the Court: It is so ordered.

SUPREME COURT

STATE OF OKLAHOMA

APRIL TERM, 1914

PRESENT:

MATTHEW J. KANE, CHIEF JUSTICE.
JOHN B. TURNER, VICE CHIEF JUSTICE
R. H. LOOFBOURROW,
STILLWELL H. RUSSELL, } JUSTICES.
FINIS E. RIDDLE,

JOHNSON *et al.* v. RIDDLE.

No. 1190. Opinion Filed February 10, 1914.

Rehearing Denied April 17, 1914.

(139 Pac. 1143.)

1. **PUBLIC LANDS—Town-Site Commission—Jurisdiction—Indians.** A town-site commission for the Chickasaw Nation, appointed and acting under the provisions of the act of Congress of June 28, 1898 (30 St. at L. 495, c. 504), had power and jurisdiction to decide contests between conflicting claimants of a preference right to purchase a town lot; and, upon the abolition of the commission, its powers and jurisdiction were transferred to the United States Indian Inspector for Indian Territory.
2. **SAME—Erroneous Patent—Remedy of Rightful Claimant.** It is well settled that, if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or because of a gross or fraudulent mistake of the facts, the rightful claimant has a remedy, and may avoid the decision of the

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Land Department and charge the legal title of the patentee with his equitable right to it, either upon the ground that, upon the facts found, conceded, or established, without dispute, at the final hearing before the department, its officers fell into a clear error in the construction of the law applicable to the case, which caused them to issue the patent to the wrong party, or that, through fraud or gross mistake, they fell into a misapprehension of the facts proved before them, which had the like effect.

3. **EVIDENCE—Presumption—Acts of Officers.** In a suit to enforce such a remedy, however, all reasonable presumptions must be indulged in support of the officers intrusted by the law with the proceedings resulting in the patent.
4. **PUBLIC LANDS—Town-Site Commission—Contest.** A town-site commission for the Chickasaw Nation, acting under authority of the "Atoka Agreement," which is embraced in an act of Congress approved June 28, 1898 (30 St. at L. 495, c. 504), and which provides, "When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage and temporary houses, have been made, shall be valued by the commission, * * * the owners of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value, * * * " etc., is under the duty, when two persons appear and contest for the preference right to purchase a lot, to decide two things: First, are the improvements on the lot sufficient under the law to entitle it to be listed as an improved lot? Second, if so, which of the contesting claimants owns the improvements situated on the lot? And, having determined these questions, it is under the duty of awarding to the owner of such improvements the preference right to purchase the lot; and this regardless of any question of former possession, or previous holding of the lot raised by the parties that does not involve the ownership of the improvements.
5. **FORCIBLE ENTRY AND DETAINER—Nature of Action—Possession.** An unlawful detainer suit brought in Indian Territory, under the provisions of the laws of Arkansas (Mans. Dig. c. 67, sec. 3365) in force there, was purely a proceeding at law, involving in no way the equitable jurisdiction of the court, or the title to the property. Such suit related solely to the question of possession. (Syllabus by Brewer, C.)

*Error from District Court, Carter County;
S. H. Russell, Judge.*

Ejectment by F. E. Riddle against E. B. Johnson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Bond & Melton and C. C. Potter, for plaintiffs in error.

W. A. Ledbetter, A. C. Cruce, and C. B. Stuart, for defendant in error.

*Appealed to the Supreme Court of the United States.

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Opinion by BREWER, C. This is a suit in ejectment brought to recover lot 3, block 46, in the city of Chickasha, by F. E. Riddle, the holder of the legal title thereto under a deed issued to him under the town-site laws applicable to the Choctaw and Chickasaw Nations, against E. B. and H. B. Johnson and the First National Bank Building Company and others. The defendants admit the legal title to be in Riddle but, by cross-petition, seek to have the court declare him a constructive trustee, holding the legal title for their use and benefit, and to decree a conveyance of title from him to them. The district court of Carter county refused to declare a trust, and awarded judgment to Riddle for the lot. From this judgment the defendants bring error.

In 1892 one Fitzpatrick, a citizen of the United States, without membership in any Indian Tribe or Nation, or any rights which might flow from such tribal membership, made a contract with one Barnhart, relative to the lot in controversy, the same being at the time a vacant unimproved lot, by which contract Barnhart went into possession of the lot and erected thereon a substantial but inexpensive house and other improvements, which were to belong to him; but he was to pay a small ground rent to Fitzpatrick. It is not attempted to be shown in the record what right Fitzpatrick claimed, or that in fact he had any right, to seize upon vacant tribal lands and contract concerning them, as he did. In 1897 Barnhart sold the improvements on the lot, and transferred the possession to one Ellis, who went into possession and further improved it. Barnhart had paid ground rent, and Ellis, after he went into possession, made some payments of money to Fitzpatrick which may be treated as ground rent, but which, in the contest later before the department, Ellis claimed had been paid, not as rent, but for other purposes. It is certain that about April 1, 1898, Ellis refused to pay rent, and on July 7, 1898, Fitzpatrick brought an unlawful detainer suit against Ellis in the United States Court for the Southern District of Indian Territory, alleging, in addition to the usual averments in such a petition, that he desired possession for the purpose of being able to place thereon such improvements as would

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give him, under the town-site laws, then enacted, the preference right to purchase the lot. After bringing the suit, April 8, 1899, Fitzpatrick conveyed any right he had to Ella Cross, who in turn conveyed a one-half interest to one Bourland on September 10, 1900.

Fitzpatrick prevailed in the unlawful detainer suit in the United States Court, also, on appeal, in the Indian Territory Court of Appeals (*Ellis v. Fitzpatrick*, 3 Ind. T. 656, 64 S. W. 567), also in the Eighth Circuit Court of Appeals by a decision given October 27, 1902 (118 Fed. 430, 55 C. C. A. 260). In the meantime Ellis retained possession of the lot through a super-sedeas bond.

On February 8, 1902, the town-site commission for the Chickasaw Nation, organized pursuant to the provisions of what has been usually called the "Atoka Agreement" (Act June 28, 1898, c. 504, 30 St. at L. 495), proceeded to Chickasha for the purpose of scheduling town lots to those possessing the preference right to purchase same, under the law. This being prior to the final decision in the unlawful detainer suit, a clerk in the town-site office marked the lot in litigation on the tentative schedule. On March 26, 1902, Ellis conveyed his rights to Riddle and Mat Cook, and on the same day Riddle appeared before the agent in charge of the town-site schedule and produced his bill of sale to the improvements, and represented that, while the possession of the lot was in litigation in the unlawful detainer suit, the improvements on the lot, and the ownership thereof, were not in litigation; thereupon the lot was scheduled to Riddle and Cook, who were later, on June 12, 1902, notified that they had the preference right, under the law, to purchase the lot. They availed themselves of this right on June 19, 1902, by paying to the United States Indian Agent the full sum required under the law and the appraisement placed on the lot. On September 26, 1902, Bourland and Cross, as claimants under Fitzpatrick, protested by letter to the town-site commission, and seem to have continued the correspondence until July 31, 1903, when H. B. Johnson, who in the meantime had purchased the Fitzpatrick

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claim, also deposited the purchase price of the lot with the United States Indian Agent.

On January 1, 1902, before the Johnsons had purchased or claimed any interest in the lot, H. B. Johnson, who it appears owned or was interested in an adjoining lot, entered into the following agreement with Ellis:

"Indian Territory, Southern District. This agreement made and entered into on this day by and between J. P. Ellis, party of the first part, and H. B. Johnson, party of the second part, witnesseth: That the party of the second part being desirous of using the rear end of lot number three in block forty-six, owned by the party of the first part, and he hereby agrees to erect good, substantial waterclosets, and to fence the same in with a good board fence, and to be paid for the use and rent of said premises. It is especially agreed that said improvements so erected shall be owned by and be the property of the first party to be used by him and his tenants for water-closet purposes and as a back yard, for a term of twelve months, and until the same are paid for in full subject to the provisions hereafter mentioned in case party of the first part should not be compelled to use the same after the expiration of first twelve months and in that case he shall pay party of the second part the cost of said improvements less the use of the same for said twelve months which is agreed upon to be at the rate of one dollar per month. It is agreed that the tenants of party of first part shall have the privilege of using one of said closets, so long as they do so without molesting party of the second part and his tenants by using same in such a way as to interfere with said second party and tenants. In case any disagreements should arise, and not settled satisfactory by said parties otherwise, then said party shall have the right of paying the said second party the full cost of said improvements and take full possession of same. Witness our hands this January 1, 1902. J. P. Ellis. H. B. Johnson."

In January, 1903, Bourland and Cross obtained possession of the lot, and on February 3, 1903, Riddle and Cook instituted this suit in ejectment. On May 25, 1903, the Johnsons bought the claims of Bourland and Cross, and were later made defendants, together with the First National Bank Building Company. These new defendants filed answer and cross-petition reciting all the previous litigation and the various transactions herein mentioned. Their vendors, Bourland and Cross, were engaged

in a contest proceeding, when the Johnsons bought them out, before the town-site commission relative to the award and scheduling of the lot, which was, on October 1, 1906, decided against them and in favor of Riddle and Cook, by J. George Wright, United States Indian Inspector. Voluminous evidence was introduced, and all the facts relative to the history of the lot, its possession, improvements, and the litigation in which it had been involved, were fully and minutely gone into and considered by the inspector. The inspector found that Riddle and Cook were the owners of the improvements on the lot, and that they were permanent and substantial, as required by the town-site law, and were such as would entitle such owners to have scheduled in their name, with the preference right to purchase, the lot on which they stood; and that, by virtue of their ownership of the improvements, Riddle and Cook were entitled under the law to the preference right to purchase the lot, and to obtain title upon payment of the purchase price. The decision noted all the facts herein mentioned, and all the findings were in favor of Riddle and Cook, with a particular finding that, under the evidence, the charge of fraud made in regard to the scheduling of the lot "was not entitled to serious consideration."

An appeal was taken from the decision of the inspector to the Commissioner of Indian Affairs, and there affirmed in an opinion. From thence it was taken before the Secretary of the Interior and again affirmed in an opinion. It was then reviewed by an Assistant Attorney General, who concurred in the decision of the department. Patent was finally issued to Riddle and Cook, May, 1907. Riddle in the meantime bought Cook's interest, and declared same in additional pleadings. While the unlawful detainer suit was pending, Bourland and Cross tried, by an injunction suit, to get possession of the lot for the purpose of improving it so as to qualify for preference right to purchase. They were refused the relief, and the judgment became final. After the unlawful detainer suit was decided in plaintiffs' favor, Bourland and Cross brought suit upon the bond under which Riddle's predecessor had retained possession, but it was determined in that suit that plaintiffs were not the owners of the

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improvements on the lot, and that Riddle's predecessor in interest was such owner. This judgment became final.

"The provisions of the Atoka Agreement, by which the right to purchase lots in the Choctaw and Chickasaw Nations was conferred, so far as it is necessary to set them out in this case, as contained in the Curtis Bill (Act Congress June 28, 1898, 30 U. S. St. at L. 495), follow: 'It is further agreed that there shall be appointed a commission for each of the two nations. Each commission shall consist of one member, to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the President of the United States. Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States District Court for the district in which the town is located, and one with the principal chief or governor of the nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at 50 per centum of the appraised value of such improved property, and the remainder of such improved property at 62½ per centum of said market value within 60 days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, or the limit or extent of said town, either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to sit with said commission, who is not interested in town lots, who shall act with them to determine said value.' "

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After the passage of the act of Congress of March 3, 1905 (33 St. at L. 1048-1059, c. 1479), the town-site commissions were abolished, and the rules and regulations were altered and superseded to the extent that the Indian Inspector for the Indian Territory was charged with the duty of completing their work under the supervision, and subject to the approval, of the Secretary of the Interior.

The only question in this case is: Did the department err, as a matter of law, in awarding Riddle and Cook the preference right of purchase of the lot in controversy? There is no doubt but that the courts have a limited right to review, and power to overturn, the final decisions of the Land Department.

The rule seems well established that, as said in *Alluwee Oil Co. v. Shufflin*, 32 Okla. 808, 124 Pac. 15:

"If the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or because of a gross or fraudulent mistake of the facts, the rightful claimant has a remedy, and may avoid the decision of the Land Department and charge the legal title of the patentee with his equitable right to it, either upon the ground 'that, upon the facts found, conceded, or established, without dispute, at the final hearing before the department, its officers fell into a clear error in the construction of the law applicable to the case, which caused them to issue the patent to the wrong party, or that, through fraud or gross mistake, they fell into a misapprehension of the facts proved before them, which had the like effect.' *Garrett et al. v. Walcott*, 25 Okla. 574, 106 Pac. 848; *Baldwin v. Keith*, 13 Okla. 624, 75 Pac. 1124; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540; *Gonzales v. French*, 163 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 548."

It is no longer open to controversy that the town-site commissions in Indian Territory, acting under congressional authority, had power and jurisdiction to pass upon contests between conflicting claimants of the preference right to purchase town lots, and that, upon the abolition of the commissions, their power was transferred to the Indian Inspector. *Ross v. Stewart*, 227 U. S. 530, 33 Sup. Ct. 345, 57 L. Ed. 626; *Fast v. Walcott*, 38 Okla. 715, 134 Pac. 848.

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In the case of *Ross v. Stewart, supra*, it is said by the Supreme Court of the United States:

“Relief will not be given in the courts from the decision of a town-site commission for a town in the Cherokee Nation in a contest arising on conflicting applications to purchase, or from the resulting patent, unless it clearly appears that the commissioners committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, and that as a result the patent was issued to the wrong party.”

And further it is said in the opinion that, in determining the matter, the test is:

“All reasonable presumptions must be indulged in support of the action of the officers to whom the law intrusted the proceedings resulting in the patent, and, unless it clearly appears that they committed some material error of law, * * * their action must stand.”

The unlawful detainer suit between the remote predecessors of the present parties was purely a proceeding at law, involving the sole question of possession, and in no way involving the equitable jurisdiction of the court or the title to the property. *Brennan v. Shanks*, 24 Okla. 575, 103 Pac. 705.

In this case it is conceded that the findings of facts of the department are conclusive, and there are no circumstances of fraud or gross mistake to justify us in going into them, if it were not so conceded. So our inquiry is narrowed to a search of the department's decision to determine if, in awarding and patenting the lot to Riddle and Cook, it fell into an error of law. In approaching this question, we must constantly bear in mind the important facts that Riddle and Cook were, at the time the commission made the schedule, and their predecessors had been at all times prior thereto, the owners in possession of all the improvements on the lot; and that the Johnsons and their predecessors had never owned any improvements on it; and, further, that the improvements on the lot had not been forfeited to, or become the property of, the Johnsons or their grantors by operation of law for failure to remove them from the lot; that these facts are established by the final decisions of the suits between

the parties hereinbefore referred to, as well as by the findings and decision of the department.

As to the forfeiture of the improvements by not removing them in a reasonable time, which might generally result, it may be added that the department, after considering the contract under which they were made, and all the circumstances and acts of the parties, found and held that, even if this result would ordinarily follow under the contract, the forfeiture had been waived by Fitzpatrick and his successors and could not be used as a basis for the claim of ownership by them of the improvements. This was the decision of a mixed question of law and fact, involving intent to be gathered from the acts of the parties and all the circumstances, and is not subject to review by the court. We then come to the consideration of the provision of the law which must be applied. It follows:

"When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made shall be valued by the commission, * * * the owners of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value. * * *"

It is believed that when a person applied to the town-site commission to have a particular lot scheduled to him under this law, and another person appeared and contested his rights in the premises, the town-site commission had power to determine but two things: First. Are the improvements on the lot sufficient under the terms of the law to entitle it to be scheduled as an improved lot? Second. Who, of the claimants, owns the improvements situated on the lot? That the improvements on this lot met the requirements of the law is beyond doubt. Then when the town-site commission, upon its investigation, found, as we again assert, that Riddle owned the improvements, and that the Johnsons owned no improvements, how can it be successfully affirmed that, in awarding the lot to Riddle, it fell into an error of law? If the Indian Tribe, as owner of these town lots, having no relation with any of the claimants, and no relation to, or responsibility for, the possessory rights the courts had recognized as between the parties, had the right to prescribe the terms, ar-

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bitrary though they were, as to whom it would give the preference right to purchase, and has done this in the agreement with the government, then, if it had the right to do so, it would seem that when the government, in carrying out the agreement, through the town-site commission, scheduled the lot to the actual owner of the improvements, it followed the terms of the law, instead of falling into an error of law.

Much has been said in the briefs about the improvements being wrongfully on the lot; but this loses its force when we examine and find that they were placed there in conformity to a contract which provided for an ownership of the improvements separate and distinct from the claim of possession, and which made no provision for their removal from the lot, or their acquisition by Fitzpatrick. In other words, these parties dealt with a lot at a time neither owned or could own it, and by the terms of their own contract one of them found himself, later on, qualified as a purchaser of the lot, when an agreement made between the federal government and its owner came to be put in operation. But it is strongly and persuasively urged, and we were induced in the former opinion in this case to believe, that we should go beyond the letter and plain meaning of the law, and consider the prior possession and previous holding of the lot. But after much consideration, aided by additional briefs and oral arguments, we think our first view was incorrect.

It is not believed, under the situation attending the disposition of town lots in the Choctaw and Chickasaw Nations, and especially pertaining to the treaty rights granted to certain persons of preference right purchasers, that the general rules of equity as applied, under the general laws enacted in reference to the disposition by the federal government of its own public lands to its own citizens, can be resorted to, or that the commission, when it came to decide to whom a lot in controversy should be awarded, was required, or had in fact the right, to look elsewhere than to the language and clear intent of the treaty in determining whether an individual claimant, or, in a contest, which of the claimants, was entitled to the right of preferential purchase. In other words, it is thought that in those nations the

question of "previous holding" or former possession of the lot was quite immaterial, as it in no sense entered into or constituted a qualification to become a preferred purchaser under the treaty. A citizen of the United States, or even a member of the tribe, for that matter, might have been penning his herds on one or more of these lots since time immemorial, and without having qualified under the treaty, by placing and owning such improvements on the lot as it contemplated, the lot would have been sold at auction as an unimproved lot, to the highest bidder, quite regardless of the previous holding or former possession. This view probably could not be maintained under the agreements and laws applicable to some of the other tribes in Indian Territory, such as the Cherokee and Creek tribes, and the reasons therefor will be noticed further on.

We are aware that, long before any of the agreements looking to the allotment of their lands, and the segregation of the town sites were made with the civilized tribes of Indians in Indian Territory, towns and villages had sprung up and white people were gradually populating the country; and in dealing with one another, and even with individual members of the tribes, where the tribe or nation was not itself concerned, the courts recognized the possessory rights of those occupying town lots. The early cases are *Kelly et al. v. Johnson et al.*, 1 Ind. T. 184, 39 S. W. 352, and *Walker Trad. Co. v. Grady Trad. Co.*, 1 Ind. T. 191, 39 S. W. 354. But this recognition did not proceed upon the idea that such possessor of a lot had a scintilla of actual title, or at that time any known means of ever acquiring it; but that inasmuch as a member of the tribe, while without any individual title, or the power to acquire such, in any part of the tribal lands, had, when once he went into possession, the right to remain and occupy the land possessed, as against other members of the tribe, when such member delivered to another, even a nonmember of the tribe, his possession of a lot (and this was the practically universal custom), the courts upheld and protected such possession (*Williams v. Works*, 4 Ind. T. 587, 76 S. W. 246), probably for the very good reason that, under the law, no other individual could possibly assert any

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superior right in himself to it. It nevertheless is true that in those early days, prior to the adoption of the treaty involved here, nonmembers of the tribe were without any rights, relative to the lands, as between themselves and the tribes.

In *St. L. & S. F. R. Co. v. Pfennighausen*, 7 Ind. T. 689, 104 S. W. 882, Justice Clayton, one of the best informed men of that time on matters peculiarly affecting the civilized tribes of Indians, said:

"Up to the time of the passage of that bill, as between these people and the Creek Nation, they were only squatters and trespassers, without any title, legal or equitable, to the land. But, as between themselves and others dealing with them in relation to the lands having full knowledge of the situation, the courts have always recognized their contracts relating to them."

Prior to the adoption of the various agreements with these tribes, relating to town sites, it cannot be said that the federal government either invited or induced the white man to settle or come upon the Indian lands. The law (section 2118, U. S. Rev. Stat. 1878) was to the contrary. Neither were the tribal governments of the Choctaws and Chickasaws responsible for the white man's coming onto their lands. Their laws and policy were directed, with all the strength they could summon in their weakness, against our coming and possessing their lands (*Laws Choctaw Nation*, pp. 248, 268, as mentioned in *Walker Trad. Co. v. Grady Trad. Co.*, *supra*), and yet the white man came and builded towns. The provisions in the treaty, not recognizing rights, but granting rights to the white man, were not to get him to come, but because he had already arrived; and the treaty makers found him here. So much has been said by way of premise, upon which to view the treaty provisions which the town-site commission was called upon, and we in turn are called upon, to construe. When the agreement was being negotiated, the tribes, in their tribal capacity, were the sole and exclusive proprietors of the lands upon which the towns and villages stood. There was not an outstanding right or equity against their proprietorship which they, under the law, were obliged to recognize, or even consider. As against the tribe, the fee owner, no court had ever held, and no law had ever intimated, that any individual had any

right in law or equity he could assert. Like any other proprietor, when they came to make an arrangement, by agreement for the sale of their lands, they had the right to name the terms of its sale; and, if they thought it wise or just to give, as they must have thought, the preference right to any one to buy a specific lot at less than its value, they had the right to arbitrarily determine who it should be. The tribes, through their treaty making agents, well knew the conditions; that white men were in possession of the town lots, unimproved as well as those that were improved. They also knew and recognized that the placing of buildings on lots had increased the value, not only of the lots on which they stood, but of all the vacant lots. It was apparent that this increase of value ought to be accounted an equity lodged in some one. In whom should it be lodged? In the individual, white or Indian, who had merely held possession of lots, and received ground rent for same, which of itself alone added no value to the property? Or should it be to the man who built and owned the improvements, which, aggregated, gave the property value? This question was settled in the agreement. The only parties having the right to say, or even to complain, have said, in language that needs the application of no rules of construction, that the preference right to purchase a lot in a town in one of these nations is in "the owner of the improvements" situated on the lot.

Very little, if anything, can be said of the equities, at least of either of the present parties before the court. Both of them bought their way into a lawsuit; they each had full knowledge of all the facts. Riddle had been an attorney in the litigation. The Johnsons were occupying a part of the lot the year before they purchased, under a written contract of tenancy with Ellis, Riddle's grantor, in which his ownership of the lot seems to be admitted. When the Johnsons purchased, the lot had long since been awarded to Riddle, and the purchase price deposited by him. The controversy was at the time in its initial stages before the Land Office, yet they bought in and took the burden of the contest on their own shoulders. Both parties stand now,

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as they have always stood, wagering their money on their judgment as to the outcome of the litigation.

As suggested earlier in this opinion, the agreements made between the federal government and some of the other tribes, relative to the disposition of their town lots, would probably require a different construction. In the agreement with the Cherokees (Act July 1, 1902, c. 1375, 32 St. at L. 716), and that with the Creeks (Act March 1, 1901, c. 676, 31 St. at L. 861), it would seem that the question of "rightful possession," or, in other words, the "previous holding of the lot," would enter as an element into the qualification of a claimant as a preference right purchaser. But those agreements were made long after the one involved here, between other proprietors and the government, and under very different local conditions, at least as to the Cherokees.

We have come to the conclusion that it has not been demonstrated that the department, charged with the decision of this matter, fell into an error of law and, because of such error, awarded the lot in question to the wrong party. This was the holding of the trial court, and we think it clear that the judgment therein rendered should be affirmed.

By the Court: It is so ordered.

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No. 3204. Opinion Filed April 17, 1914.

(140 Pac. 427.)

INDIANS—Descent and Distribution—What Law Governs. Under the Act of April 28, 1904, c. 1824, 33 St. 573, the Arkansas law of descent and distribution of decedents' estates, as provided in chapter 49, Mans. Dig. (secs. 2522-2545), was extended over and put in force as to the estates of all tribes of Indians and all other persons, freedmen or otherwise, in the Indian Territory. And the heirs of a deceased member of the Peoria Tribe who died in 1906 inherited under the Arkansas law.

(Syllabus by Harrison, C.)

Error from District Court, Ottawa County;
Preston S. Davis, Judge.

Labadie et al. v. Smith.

Action by Isadora Smith against Ella Labadie, Roy C. Labadie, Edna Labadie Jones, William Groom, and G. W. Helmick. Judgment for plaintiff, and defendants bring error. Affirmed.

E. E. Sapp, D. W. Cooter, and L. T. Crum, for plaintiffs in error.

F. D. Fulkerson, for defendant in error.

Opinion by HARRISON, C. This was an action by Isadora Smith against her stepmother and half-brother and sister for a one-third interest in the estate of her deceased half-brother and for her share of the rents from same. The defendants, Groom and Helmick, were tenants on the estate and were made parties defendant. The facts are: That one Charles Labadie, a Peoria Indian, died in the year 1899 and left surviving him his wife, Ella Labadie, a white woman, and three children by her, and one, Isadora Smith, by a former wife. The children by the latter wife were the defendants Roy C. Labadie, Edna Labadie Jones, and Clarence Raymond Labadie, who afterward in 1906 died intestate and without issue, possessed of certain tracts of land. After his death the mother went into possession of this land under the Kansas law of descent and distribution. In 1910, Isadora Smith, the child by the former wife, brought this action against the surviving wife and her two surviving children, claiming that the land of her deceased half-brother descended to her and her surviving half-brother and sister under the laws of Arkansas and that the surviving wife had no interest in the estate of her deceased son, Clarence Raymond Labadie. The defendants answered, claiming the estate of the deceased under the Kansas law of descent and distribution which, by the Act of Congress Feb. 8, 1887, c. 119, sec. 5, 24 Stat. 389, as amended by Act of Congress March 2, 1889, c. 422, 25 Stat. 1013, was put in force as to the estates of the Peoria and some other tribes of Indians, and that such law, having never been repealed, was in force at the time of Clarence Labadie's death, and that the mother, Ella Labadie, under such law inherited all of her son's estate; she being the sole surviving parent. The issues being

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thus joined by petition and answer, the plaintiff, Isadora Smith, moved the court for judgment on the pleadings. The court sustained the motion and rendered judgment upon the pleadings in her favor, decreeing her a one-third interest in the estate on the theory that the Arkansas law was in force at the time of the death of her half-brother, and from such judgment the defendants appeal.

It is conceded by counsel for both parties to the appeal that a proper determination of the case depends upon which law of descent and distribution was in force at the time Clarence Labadie died. It is contended by plaintiffs in error that the Kansas law was in force, and by defendant in error that the Arkansas law was in force. Hence a review of the different acts of Congress on the subject is necessary in order to properly determine the controversy.

In 1887 (24 St. at L. 389) Congress passed an act providing for the allotment of lands in severalty to certain tribes of Indians, section 5 of which provides in part as follows:

“* * * Provided, that the laws of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act. * * *

Under section 8 of this act, it is provided that the Peoria Indians, of which tribe the heirs in question were members, together with some other tribes of Indians, were excepted from its provisions, but by the Act of March 2, 1889, c. 422, 25 St. at L. 1013, the provisions of section 5, *supra*, were extended to the Peoria and some other tribes. Thus the law of descent and distribution was extended to and remained in force as to the Peoria Tribe until the Act of April 28, 1904, c. 1824, 33 St. at L. 573, which in part provided:

“All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and

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complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, * * * whether Indians, freedmen, or otherwise. * * *

It is true, as contended by plaintiffs in error, that said act contained no repealing clause of laws in conflict therewith. Hence, if the provisions of the acts of 1887, 1889, *supra*, which put the Kansas law of descent in force, were repealed at all, they were repealed by implication; counsel for plaintiffs in error contending that such acts were not so repealed, citing a strong list of authorities in opposition to repeals by implication; and, while the authorities cited are strongly in opposition to the general doctrine of repeals by implication, yet they do not cover and should not control the exact question involved in the case at bar. For, prior to the Act of April 28, 1904, c. 1824, 33 St. at L. 573, there had been no universal law on the subject of descent and distribution applicable alike to all the tribes of Indians, freedmen, or otherwise, within the limits of the Indian Territory. By such act a universal law applicable alike to all tribes of Indians, freedmen, or otherwise, and all other persons within the limits of the Indian Territory, was provided, and the Arkansas law of descent and distribution (chapter 49, Mansf. Dig.) was put in force. It was evidently the intent of Congress, in order to avoid the interminable conflicts which would necessarily arise from laws of descent applicable to some tribes and not applicable to others, to provide a universal law applicable to all alike and to repeal all laws in conflict therewith. The necessity for such a universal law was so great and the intricate controversies liable to arise under the then existing and conflicting laws of descent so numerous, that the intention of Congress to provide a law of universal application is too clear to admit of doubt. While we do not feel that the departmental construction of legislative intent is controlling or binding upon this court, yet considerable light on the subject may be had from an opinion from the Assistant Attorney General to the Department of Indian Affairs, wherein the rights of the heirs of an Eastern Shawnee, whose status as to descent was the same as that of the Peorias, were involved; the opinion being as follows:

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"Sir: The Department is in receipt of your letter of February 1, 1907 (Land 91656-1907), submitting the succession of Lucinda Dick, Eastern Shawnee, requesting decision by the Department for determination of the rule of descent for distribution of proceeds of sale of her allotted lands. Allotment of the lands was made to her under the Act of February 8, 1887 ([C. 119] 24 St. at L. 388). Section 5 whereof provided that: 'The laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in Indian Territory which may be allotted in severalty under the provisions of this act.' The Act of May 2, 1890 ([C. 182] 26 St. at L. 81, 94), sections 30 and 31, provided: 'Sec. 30. * * * The judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the state of Arkansas extended over and put in force in said Indian Territory by this act shall not apply. Sec. 31. * * * That certain general laws of the state of Arkansas * * * as published in * * * Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes relating to administration, chapter one * * * to descents and distributions, chapter forty-nine.' The Act of June 7, 1897 ([C. 3] 30 St. at L. 62, 83), provided that after January 1, 1898, the United States courts in Indian Territory have exclusive jurisdiction of all civil causes after that date instituted, and all criminal causes for punishment of offenses after that date committed, and that the laws of the United States and the state of Arkansas in force in the territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in trial of like causes. The Act of April 28, 1904 [C. 1824], sec. 2 (33 St. at L. 573), provided: 'All the laws of Arkansas heretofore put in force in the Indian Territory, are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents * * * whether Indians, freedmen or otherwise.' The Act of June 28.

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1898 [C. 517], sec. 26 (30 St. at L. 495, 504), forbids enforcement of tribal laws in courts of the United States, and section 28 abolished the tribal courts, July 1, 1898, as to all but three tribes named, and as to them on October 1, 1898, so that no courts existed for enforcement of tribal laws. The effect of this was to abolish the tribal law of descent. *Nivens v. Nivens* (64 Saw. 604).

"Lucinda Dick died July 14, 1905, seised of her allotted lands, and the question determining devolution of her lands depends on whether the law of Kansas or Arkansas governed the succession at date of her death. The Act of 1890 is necessary to be considered for interpretation of the Act of 1897 making the laws of Arkansas then in force as to persons not tribal Indians applicable to 'all persons therein irrespective of race,' and Act of 1904 which 'continued and extended' the Arkansas laws, then partially in force, to 'embrace all persons and estates,' Indian or otherwise. No room is left to doubt that Congress intended to make the law uniform as to all classes of persons and their estates. It is a fundamental proposition that no one is heir to any one living, so that no expectant rights of inheritance or succession are vested rights or can become vested till death of the *propositus* last seised. It necessarily follows that change in the law of succession is purely a question of legislative policy, and that the legislative action upon it is conclusive, violating no right and admitting no review by either executive or judicial authority. In case of *Loyal Creek Claims* (25 Ops. Attys. General, 163, 165) the Attorney General rendered opinion that the Act of June 7, 1897, *supra*, 'operated to extend the Arkansas law of distribution to the individual estates of Indians dying after January 1, 1898.' The act was general and applied to all Indians, not to Creeks alone, and from April 28, 1904, at least, the laws of Arkansas so partially adopted by Act of June 7, 1897, were extended to all persons and all decedents' estates. The Department therefore decides and you are instructed that as Lucinda Dick died after April 28, 1904, the lands of which she died seised descended and their proceeds are to be distributed according to the law of descent and succession of real estate under the laws of the state of Arkansas, in force at close of the general assembly of that state of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas."

This interpretation of the law has been recognized and followed by the Department since the Act of April 28, 1904, went into effect. Upon the subject of courts being controlled by de-

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partmental construction, the Supreme Court of the United States, in *United States v. Moore*, 95 U. S. 763, 24 L. Ed. 588, said:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards v. Darby*, 12 Wheat. 210 [6 L. Ed. 603]; *United States v. State Bank of North Carolina*, 6 Pet. 29 [8 L. Ed. 308]; *United States v. MacDaniel*, 7 Pet. 1 [8 L. Ed. 587]. The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

Again, in *United States v. Alabama Ry. Co.*, 142 U. S. 621, 12 Sup. Ct. 308, 35 L. Ed. 1134, the court held:

"The contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations, * * * should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change."

Also, this court in *League v. Town of Taloga*, 35 Okla. 277, 129 Pac. 702, it was held:

"The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation."

There being a federal question in the case at bar, we feel inclined to, if not bound by, the doctrine announced in the foregoing decisions. Besides, there is a sharp, decided conflict in the provisions of the two acts; the one being applicable only to the tribes therein mentioned, the other, a later act, being expressly made applicable to all tribes and other persons, freedmen, or otherwise, within the limits of the Indian Territory. The general rule in such cases is that, "where two legislative acts are repugnant to or in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause." 36 Cyc. 1073, and authorities cited.

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Also, in *Mining Co. v. Gardner*, 173 U. S. 128, 19 Sup. Ct. 328, 43 L. Ed. 637, the Supreme Court held:

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. In *United States v. Tymen*, 11 Wall. 92 [20 L. Ed. 153], it was said by Mr. Justice Field that: 'When there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' * * * This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it."

Hence, in view of the foregoing authorities and the conditions existing in the Indian Territory at the time the Act of April 28, 1904, went into effect, we believe that the judgment of the trial court should be affirmed.

By the Court: It is so ordered.

COOK v. WARNER.

No. 3216. Opinion Filed April 17, 1914.

(140 Pac. 424.)

1. **EQUITY—Retention of Jurisdiction—Scope of Relief.** A court of equity which has obtained jurisdiction of the controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter, and to avoid multiplicity of suits.
2. **SAME—Jurisdiction—Complete Relief.** In an action invoking the general equity powers of the district court, where title to real estate and the questions of cancellation of the instruments of conveyance or determination of the interest of various parties and the partition and sale of such real estate are involved, the court will not be divested of its jurisdiction to decree a sale of such real estate merely because in the trial of the cause it develops that a minor has an interest therein; but the court will retain jurisdiction in order to grant complete relief to all parties in interest and avoid the necessity of other suits. Hence, a sheriff's deed made pursuant to an order of sale will be valid, although a minor's undivided interest may have been conveyed under the decree.

(Syllabus by Harrison, C.)

Error from District Court, Wagoner County;
R. C. Allen, Judge.

Action by J. Carter Cook, acting as guardian and next friend of George Harris, a minor, against E. S. Warner, to set aside a judgment of the district court, and cancel a sheriff's deed. Judgment for defendant, and plaintiff brings error. Affirmed.

J. Carter Cook, for plaintiff in error.

Chas. F. Runyan, for defendant in error.

Opinion by HARRISON, C. In May, 1911, the guardian of George Harris, a minor, brought this action in the district court of Wagoner county to set aside a former judgment of the district court, and to cancel a sheriff's deed which had been executed to the defendant, E. S. Warner, pursuant to such judgment. It appears from the pleadings that in May, 1909, in an

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action by the Iowa Land & Trust Company against International Land Company and others to quiet title of certain parties to a certain tract of real estate, and to determine the interest of such parties in said tract, the court, in passing upon the issues presented in such suit, determined and decreed that George Harris, a minor, in whose behalf as guardian J. Carter Cook prosecutes this action, had a one-fourth interest in the tract of land in question, and that defendant, E. S. Warner, had the remaining three-fourths interest therein. Whereupon the court ordered a partition of the land in question if it could be fairly and equitably divided, and, in the event it could not be so divided, that the land be appraised and sold, and that the proceeds of sale, after payment of costs, be distributed to Warner and to George Harris, the minor, according to their respective interests in the estate, and that the proceeds to which said minor would be entitled should be paid into court to be paid out by the clerk of said court to the minor's proper guardian, and that, upon the report to the court that the land could not be fairly and equitably partitioned, the court ordered it appraised and sold according to law, which was done, and which sale being duly confirmed, the court ordered the sheriff to execute a deed to the purchaser. Pursuant to which order the sheriff executed a deed to the entire tract to E. S. Warner, the purchaser and defendant in error herein. Some two years thereafter this action was brought to set aside such judgment, and to cancel the sheriff's deed to Warner. When the cause came on for hearing in September, 1911, the court sustained a demurrer to the plaintiff's petition. The plaintiff refused to plead further, and the court rendered judgment in favor of Warner, and, from such judgment, this appeal is prosecuted.

The decisive question presented in this appeal is whether, in an action by adults to determine and settle the title to real estate, and to determine interests of adverse claimants thereto, a district court should be divested of its equity jurisdiction to grant complete relief in the premises simply because it developed in the trial, and had been decreed by the court, that a minor had an interest in the estate.

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It is urged by plaintiff in error that the district court had no jurisdiction to decree the sale of the minor's interest; that such jurisdiction is vested exclusively in the probate courts of our state. This was the theory upon which the action was brought in the court below, and, upon the theory that the district court was not divested of such jurisdiction, the demurrer to the petition was sustained. No authorities on this exact point in question are presented by either party to the appeal; but each contents himself with an analysis of the constitutional and statutory provisions in reference to the subject, and with an argument and citation of authorities in support of their respective interpretation of such constitutional and statutory provisions, and, but for other well-recognized principles of law which we must recognize in determining this question, it might be said that either interpretation is correct. Article 7, sec. 12 (197), of Williams' Constitution in part provides:

"The county court, coextensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest: Provided, that the county court shall not have jurisdiction in any action for malicious prosecution, or in any action for divorce or alimony, or in any actions against officers for misconduct in office, or in actions for slander or libel, or in actions for the specific performance of contracts for the sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, not arising under its probate jurisdiction."

Also in section 13, art. 7 (198), Williams' Ann. Const. Okla., it is provided:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof. * * *

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In section 10, art. 7 (195), Williams' Ann. Const. Okla., the jurisdiction of the district courts of our state is defined as follows:

"The district courts shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court, and such appellate jurisdiction as may be provided in this Constitution, or by law. The district courts, or any judge thereof, shall have power to issue writs of *habeas corpus*, mandamus, injunction, *quo warranto*, *certiorari*, prohibition, and other writs, remedial or otherwise, necessary or proper to carry into effect their orders, judgments, or decrees. The district courts shall also have the power of naturalization in accordance with the laws of the United States."

Let it be observed: That section 12, *supra*, provides: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters." That section 10, *supra*, provides: "The district court shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court. * * *

In other words, the county court shall have original jurisdiction in all probate matters, and the district court shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is conferred upon some other court. The words "shall have original jurisdiction" are the same and used in the same sense as to both courts; that is, the district court shall have original jurisdiction in all cases, civil and criminal, the same as the county court shall have original jurisdiction in all probate matters.

Now, under our statutes there are but two kinds of actions: "Actions are of two kinds: First, civil; second, criminal." (Section 4646, Rev. Laws 1910.)

"A criminal action is one prosecuted by the state, as a party, against a person charged with a public offense, for the punishment thereof." (Section 4647, *Id.*)

"Every other is a civil action." (Section 4648, *Id.*) Hence the action of which plaintiffs in error complain was a civil action in the district court, which, under our Constitution, section

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10, *supra*, has original jurisdiction over all civil cases, unless exclusive jurisdiction is conferred on some other court.

Now, the word "exclusive" is not used in reference to the jurisdiction of county courts in all probate matters in section 12, *supra*; and section 10 provides that the district court has jurisdiction in all civil cases, except where exclusive jurisdiction is conferred upon some other court. In section 1817, Rev. Laws 1910:

"* * * The county court shall have jurisdiction concurrent with justices of the peace in misdemeanor cases, and *exclusive jurisdiction* in all misdemeanor cases of which justices of the peace have no jurisdiction. * * *"

Section 2, art. 1, c. 27, Laws 1907-08, provides:

"Sec. 2. The county court, coextensive with the county, shall have original jurisdiction in all probate matters, shall have concurrent jurisdiction with the district court in civil cases in any amount over five hundred dollars and not exceeding one thousand dollars, exclusive of interest, and exclusive original jurisdiction in all sums in excess of two hundred dollars and not exceeding five hundred dollars. * * *"

These sections are referred to merely as an aid in arriving at the legislative intent, for, it being provided in section 10 of the Constitution, *supra*, that the district court has original jurisdiction in all civil cases, except where *exclusive* jurisdiction is by law conferred upon some other court, the Legislature has made use of the word "exclusive" in all cases where exclusive jurisdiction was meant to be conferred upon any particular court. By this we do not mean to be understood as holding that general original jurisdiction in probate matters is not conferred upon the county court, nor do we mean to be understood as holding that the district courts have a general concurrent jurisdiction, in probate matters, with the county court; but there are many instances, as was true in the case at bar, that in the trial and determination of other civil matters questions arise which involve partial phases of the probate law, and in such cases, especially those involving questions of equity, our district courts being vested with general equity powers, we do not believe that it was the intention of the framers of the Constitution to, in matters invoking

the general equity powers of the district court, divest it of its jurisdiction to grant complete relief to the parties in interest merely because some feature of the probate law, as an incident to the case, became involved.

The judgment complained of in the case at bar was a judgment in an action involving the title to real estate, and the cancellation of instruments of conveyance to real estate, and the determination of title of certain parties to the action in and to the real estate in question, an action which invoked the general equity powers of the district court. The court heard and determined the issues presented in the action, ordered the cancellation of certain instruments of conveyance, and determined the interest and title of the parties thereto in and to the real estate in question, and in its determination of the issues involved it developed that the minor, George Harris, plaintiff herein, owned a one-fourth interest in the real estate in question, and, upon the pleadings and upon the issues thereby formed, the court determined such minor's interest, and so decreed in its judgment.

It further appears, from the record herein of the proceedings in the judgment complained of and herein sought to be set aside, that the court, upon the issues presented to it, decided that a partition of the real estate in question was necessary in order to grant complete relief to all parties, provided it could be done fairly and equitably. Whereupon it appointed a commission to ascertain and report, and, upon the report of such commission that such real estate could not be fairly and equitably partitioned, the court decreed a sale of the entire tract as provided by law, and that the proceeds of such sale belonging to the minor, George Harris, should be paid into court to be paid out by the clerk thereof upon the order of the proper guardian of such minor. Pursuant to which order the sheriff sold the land in question and executed a deed to the purchaser.

No irregularities, inadequacy of price, or fraud in the proceedings are disclosed or complained of in the record, and we can find no valid reason, either under the provisions of the Constitution or those of the statutes, for holding that, merely because, in the trial of an action which invoked the general equity

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powers of the district court, it developed, as an incident to a final determination of such action, that a minor had an interest in the property in question, the court should thereby be divested of its powers to retain jurisdiction and render complete relief to all parties in interest.

"Equity jurisdiction, having rightfully attached to a controversy, will be made effectual for the purpose of complete relief, though it may involve the adjudication of purely legal questions. Equity will assume jurisdiction to prevent multiplicity of suits: (a) Where numerous persons have a community of interests or a common right or title in the subject-matter of controversy, as against a common adversary, or where each has an equitable cause of action or an equitable defense against such adversary, involving the same questions of law and fact; (b) where reiterated litigation at law between the same individuals concerning the same subject-matter is threatened, or has actually taken place, without conclusively adjudicating the rights." (Fetter on Eq. pp. 13-17.)

Also Pomeroy's Eq. Jurisp. c. 1, vol. 5, 2d Ed.; *Id.*, sec. 351, vol. 1, 3d Ed.; 1 Story's Eq. Jurisp. (13th Ed.) 64 K; Bailey on Juris. (2d Ed.) sec. 535.

In 16 Cyc. 106, the following rule is announced:

"A court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter. This doctrine seems to rest upon the same principles which permit a court of equity to take jurisdiction in the first instance, because the remedy is incomplete, or to avoid multiplicity of suits."

This text of equity doctrine is supported by decisions from almost every state in the Union. See authorities cited under foregoing texts.

The judgment of the trial court seems to be abundantly supported both by reason and by the above equity doctrine. No other court in our state had jurisdiction to determine the question of title to the real estate involved, nor the interests of the parties thereto, nor to decree a partition of the land, nor to order a cancellation of the instruments involved therein; and we can see no valid reason why, after the court had determined the interests of the parties, and had further ascertained, from the report

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of the commissioners appointed, that the land in question could not be fairly and equitably partitioned, the entire action should have been abated, relief suspended, the interests of the other parties disregarded until a separate action involving the necessary details and complications and extra expense, court costs and attorney's fees for the minor could be brought in the probate court by the guardian for the sale of the minor's interest in the land. Such a proceeding would have been in direct conflict with the well-established rules of equity, as well as an apparent detriment to the interests of the minor. Hence, upon the whole, in the absence of any showing of irregularity or fraud, we believe the deed executed by the sheriff pursuant to the order of the district court was valid, and that the judgment of such court should be affirmed.

By the Court: It is so ordered.

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5. **Exceptions—Instructions.** An instruction to the jury will not be considered unless exception thereto was reserved in the trial court. **Straghan v. Cooper**..... 515
6. **Exceptions—Motion for New Trial.** Errors alleged to have occurred at the trial in the lower court, unless the same are excepted to and thereafter assigned in the motion for a new trial, and made a part of the record by means of case-made or bill of exceptions, will not be considered on review. **Halley v. Bowman** 294
7. **Same—Evidence.** Erroneous rejection of testimony held not reviewable, where the error was not presented to the trial court in a motion for new trial by pointing out same or in language of Rev. Laws 1910, sec. 5033, subd. 8, prescribing as ground for new trial "error of law occurring at the trial and excepted to." **Baker v. Tate** 353
8. **Same.** The action of the court on demurrer to the evidence or on motion to direct the verdict is a matter occurring at the trial requiring motion for new trial in order to obtain review on writ of error. **Board of Com'rs of Beaver County v. Langston**..... 715
9. **Same.** To review errors at the trial, a motion for a new trial must have been acted upon at the trial. **Idem**..... 715
10. **Same.** To review errors at the trial, exceptions must have been taken to the ruling on the motion for new trial. **Idem**..... 715
- REQUISITES FOR TRANSFER OF CAUSE:**
11. **Time for Appeal—Motion for New Trial—Necessity.** Where an action is tried before a referee who reports to the trial court findings of fact, and both plaintiffs and defendant move for judgment on such findings, these motions present questions of law only, and a motion for new trial is not necessary in order to have the judgment reviewed on appeal, and the time for appeal in such case runs from the date of the judgment, and the filing of the motion for new trial does not extend or suspend the running of the time for appeal or for service of a case-made. **Veverka v. Frank** 142
12. **Time for Appeal—Overruling of Demurrer.** An appeal from an order sustaining a demurrer must be taken within one year after the order is made. **Western Union Telegraph Co. v. Dobyns**..... 493

APPEAL AND ERROR—Continued.

13. **Same.** An order overruling a demurrer will be reviewed where the appeal is taken within one year after final judgment, though not taken within one year after the order is made. *Idem*..... 403
14. **Petition in Error—Contents—Errors at Trial—Denial of New Trial.** Where plaintiff in error fails to assign as error in his petition in error the overruling of a motion for a new trial, no question which seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below is properly presented, and such alleged errors cannot therefore be reviewed. *Jennings Co. v. Dyer*..... 468
Adams v. Norton..... 497
- RECORD AND PROCEEDINGS NOT IN RECORD:
15. **Record—Review on Transcript.** Under Rev. Laws 1910, sec. 5146, prescribing what the record shall consist of, a motion for new trial copied into a transcript constitutes no part of the record. *University Realty Co. v. English*..... 593
16. **Same.** Errors alleged to have occurred during the trial cannot be brought up for review on a transcript; they must be preserved and presented by bill of exceptions or case-made. *Prochnau v. Martin* 409
17. **Same.** In an appeal by petition in error and transcript, errors assigned requiring an examination of the evidence cannot be reviewed, for the reason that the evidence is not properly preserved by the transcript, even though set out therein and certified by the clerk of the trial court. *Glass v. Gould*..... 424
18. **Same.** Errors appearing from the record proper may be reviewed on a transcript. *Idem*..... 424
19. **Same.** A motion for judgment on the findings of fact made by the referee, and a motion for new trial, and exceptions to the ruling of the trial court thereon, are not part of the record proper, and can be preserved and presented for review on appeal only by incorporating the same in a bill of exceptions or case-made. *Veverka v. Frank*..... 142
20. **Case-Made—Delay in Service.** A case-made not served within the time fixed by statute, or within the time as extended by the court before the expiration of the statutory time, is a nullity and cannot be considered on appeal. *Veverka v. Frank*..... 142
21. **Same.** Where the record fails to show due service of case-made and the record is not certified as a transcript, there being nothing presented for review, the appeal will be dismissed. *Jordon v. St. Louis & S. F. R. Co.*..... 341
22. **Case-Made—Settlement and Filing.** Where no case-made is settled and filed as required by Rev. Laws 1910, sec. 5242, errors assigned cannot be reviewed. *Bank of Stilwell v. Morris*..... 429
23. **Case-Made—Sufficiency of Certificate.** Where the signature of the trial judge to a certificate of the case-made is not attested by the seal of the court, and the case-made is not filed with the papers in the case, as required by Rev. Laws 1910, sec. 5242, the appeal will be dismissed. *Graham v. Atwood*..... 30
24. **Case-Made—Recital as to Evidence—Review.** Assignments of error which require an examination of the evidence will not be con-

APPEAL AND ERROR—Continued.

	sidered where the case-made does not state that it contains "all the evidence." <i>Graham v. Atwood</i>	30
	<i>Perkins v. Baker</i>	288
25.	Presentation for Review—Rulings on Instructions. Where the record does not contain the evidence or any statement of what it tends to prove, or that it raised the questions on which the instructions are based, objections to the instructions given cannot ordinarily be reviewed. <i>Livingston v. Chicago, R. I. & P. Ry. Co.</i>	506
	ASSIGNMENT OF ERRORS:	
26.	Assignment of Error—Denial of New Trial. To review errors at the trial, the ruling on the motion for new trial must be assigned as error. <i>Board of Com'rs of Beaver County v. Langston</i>	715
	BRIEFS:	
27.	Failure to File Brief—Dismissal. Where plaintiffs in error file no brief, as required by rule 7 (38 Okla. vi), the appeal will be dismissed for want of prosecution. <i>Terry v. Coker</i>	427
	<i>Johnston v. Marsee</i>	447
	<i>Colonial Trust Co. v. Bunney</i>	448
	<i>Wallingford v. Wood</i>	572
	<i>Deible v. Union Iron Works</i>	573
28.	Same. Where the plaintiff in error, as well as the defendant in error, fails to file and serve brief as required by rule 7 (38 Okla. vi), it will be presumed that the appeal has been abandoned, and it should be dismissed. <i>Chidsey v. Ellis</i>	422
	<i>Eads v. Ottawa County</i>	423
29.	Failure of Defendant in Error to File Brief—Reversal. Where the plaintiff in error has filed brief, as required by rule 7 of this court (38 Okla. vi), and the defendant in error fails to file brief, as required by such rule, or to offer any excuse for not doing so, the court will be justified in taking as confessed the errors assigned, to the extent of reversing the judgment appealed from. <i>Dievert v. Rainey</i>	31
30.	Same. Where the plaintiff in error has filed a brief, and the defendant in error has filed none, and has given no excuse for his failure, and upon examination of the record it appears that the errors asserted are well founded, the court is not required to search for some theory, or for authorities, that might possibly save the judgment appealed from. <i>Miles v. Bird</i>	428
	<i>First Nat. Bank v. Ballard</i>	553
31.	Specification of Errors—Argument and Authorities. Where the brief of plaintiff in error fails to contain the specifications of error complained of, separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 (38 Okla. x), the appeal may be dismissed. <i>Livingston v. C., R. I. & P. Ry. Co.</i>	506
	REVIEW:	
32.	Scope of Review—Denial of New Trial—Transcript. The denial of a new trial cannot be reviewed by means of a transcript of the record. <i>University Realty Co. v. English</i>	593
33.	Questions of Fact—Sufficiency of Evidence. Where a verdict for plaintiff is reasonably supported by the evidence, it will not be dis-	

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- turbed for insufficiency of the evidence. **St. Louis & S. F. R. Co. v. Kerns**..... 167
34. **Same.** Where the cause was submitted on proper instructions, and the verdict was supported by the evidence, the judgment will not be disturbed. **Farmers' & Merchants' Bank v. Scoggins**..... 719
35. **Same—Question of Fraud.** Where the jury has passed upon the question of fraud, and there is evidence tending to support the verdict, it will not be disturbed on appeal. **L. L. Tyer & Son v. Wheeler** 335
36. **Same—Insurance—Production of Books.** The questions whether proper demand has been made for production of books and inventory as required by an insurance policy, and whether the failure to produce was the fault of the insured are questions on which the verdict is conclusive. **Commercial Union Assur. Co. v. Wolfe**..... 342
37. **Insufficiency of Evidence—General Finding.** A general finding for a defendant seeking reformation of the written instrument sued on, on the ground of mutual mistake, should be set aside where such finding, or any particular finding necessarily included therein, is not reasonably supported by the evidence. **Schafer v. Midland Hotel Co.**..... 111
38. **Conflicting Evidence.** A verdict on conflicting evidence will not be disturbed. **Wade v. Ray**..... 641
39. **Same.** Where the evidence in a case is conflicting, the verdict of a jury thereon will not be disturbed, where the evidence and the inferences legitimately to be drawn therefrom support the verdict. **Walters Nat. Bank v. Bantock**..... 153
40. **Same.** Where the law applicable to the facts material to the issues joined by the pleadings in an action is fairly and fully submitted to the jury by the court, a verdict of a jury based upon conflicting testimony will not be disturbed if it is reasonably supported by the testimony in the case. **Atchison, T. & S. F. Ry. Co. v. Eldridge**..... 463
41. **Same.** The sufficiency of the evidence to sustain a judgment will be determined in the light of the evidence tending to support same, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts therewith. **Straughan v. Cooper**..... 515
42. **Same—Sustaining Attachment.** A decision of the trial court sustaining an attachment under the law in force in Indian Territory prior to statehood will not be disturbed on appeal where the evidence is conflicting. **Kirby v. Hardin**..... 609
43. **Discretionary Ruling—Granting New Trial.** The discretion of the trial court in granting a new trial is so broad that its action in so doing will not be disturbed on appeal unless the record shows clearly that the court has erred in the decision of some clear and unmixed question of law, and that the order granting the new trial is based upon such erroneous view of the law. **Rogers v. Quabner** 107
44. **Same.** The ruling of the trial court in setting aside the verdict of the jury and granting a new trial will not be disturbed on appeal, unless it clearly appears from the record that the trial court erred in a pure, simple, and unmixed question of law and but for such error would not have so ruled. **Leonard v. Showalter**.... 122

APPEAL AND ERROR—Continued.

45. **Harmless Error—Admission of Evidence.** In an action for slander, permitting defendant on cross-examination to show, in mitigation of damages, plaintiff's unfavorable family connection, held not ground for reversal. *Kimberlin v. Ephraim*..... 39
46. **Same.** Under Rev. Laws 1910, sec. 4791, in an action for slander, the admission of incompetent evidence that plaintiff's brother is a fugitive from justice held not ground for reversal. *Idem*..... 39
47. **Same.** Error in the improper admission of evidence as to elements of damage is cured where the instructions forbid a recovery of any sum on account of such improper elements. *First Nat. Bank v. Thompson*..... 88
48. **Same.** Permitting the use of a diagram drawn on the floor in connection with the examination of witnesses held harmless, where a similar diagram, identical in its material features, was put in the record. *St. Louis & S. F. R. Co. v. Long*..... 177
49. **Harmless Error—Instructions.** Whether in a given case, there should be a reversal for error in giving an instruction depends quite as much upon the evidence before the jury to which the instruction might be applied as upon the abstract accuracy of the language of the instruction, and so, if it is apparent that the language of the instruction, though inaccurate, yet, when applied to the evidence before the jury, it could not have misled the jury to believe their duty was different from what it actually was, the inaccuracy can afford no reason for reversal. *Big Jack Mining Co. v. Parkinson*..... 125
50. **Same.** An instruction, in an action commenced prior to statehood, that nine of the jury concurring could return a verdict was harmless where the verdict was unanimous. *First Nat. Bank v. Thompson*..... 88
51. **Same.** Where it appears from the evidence that a verdict is so clearly right that, had it been different, the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instructions. *Whitcomb v. Oller*..... 331
52. **Same—Submission of Issues on Attachment.** In an action under the law in force in the Indian Territory prior to statehood, where the court directed the jury to sustain an attachment, the error in submitting that matter to the jury was harmless, where the jury sustained the attachment in its verdict; such direction being in effect the decision of the court on that issue. *Kirby v. Hardin*..... 609
53. **Harmless Error—Parties.** That a county attorney sued to prevent the misapplication of county funds without naming the territory as the plaintiff held harmless, under St. 1893, sec. 4018 (Rev. Laws 1910, sec. 4791), where the action was tried as though the suit had been in the name of the territory. *Dolezal v. Bostick*..... 743
54. **Amendments Regarded as Made—Parties.** Where a county attorney has sued in his own name for the benefit of the territory of Oklahoma, without naming the territory as plaintiff, and the action is tried and relief given as though the territory were named, and no substantial right is prejudiced, the petition will be treated as if amended in the name of the proper party plaintiff. *Dolezal v. Bostick*..... 743

APPEAL AND ERROR—Continued.

55. **Admission of Evidence—Reversal.** The erroneous admission of evidence is ground for reversal, where prejudicial to the substantial rights of the losing party. *Brison v. McKellop*..... 374
56. **Same—Hearsay.** The admission of hearsay evidence is ground for reversal when liable to inflame the minds of the jury and prejudice them against the losing party. *Idem*..... 374

DISPOSITION OF CAUSE:

57. **Affirmance—Remand.** Where a number of issues were raised by the answer, one being a defect of parties, and that issue is submitted, and a verdict rendered for plaintiff, and a judgment thereon that plaintiff could maintain the action and that the other issues should be tried in due course, and an appeal was taken by consent, the judgment will be affirmed, and the cause remanded for trial of the other issues. *Welchel v. Hendrix*..... 717
58. **Erroneous Instructions—Cure by Remittitur.** Instructions submitting to the jury an element of damage of which there was no competent proof, duly excepted to, where the verdict is general, with nothing to indicate how the damages were apportioned, cannot be cured by remittitur. *St. Louis & S. F. R. Co. v. Criner*... 256
59. **Law of Case—Subsequent Proceedings.** The opinion in a cause appealed to the Supreme Court and remanded for further proceedings is the law of that case in the trial court as well as in the Supreme Court on any subsequent appeal. *Leonard v. Shewalter* 122
60. **Same.** Where a court on appeal holds that certain evidence was improperly admitted, such evidence is properly excluded on retrial after remand. *Kirby v. Hardin*..... 609

APPEARANCE—See “Justices of the Peace,” 2.

- General Appearance—Motion to Vacate.** Where a defendant moves to vacate a judgment and his motion is based on nonjurisdictional as well as jurisdictional grounds, he enters a general appearance. *Pratt v. Pratt*..... 577

APPLICATION OF PAYMENTS—See “Payment.”

ASSAULT AND BATTERY:

1. **Self-Defense—Injury to Bystander—Liability.** It is error to instruct the jury in effect that one who, in his lawful self-defense, at close range shoots at an assailant, and, missing him, accidentally wounds a bystander, who, at the time, is to one side of the line of true aim at such assailant, and a few feet away from him, is, in an action for damages, liable to such bystander if he knew or is chargeable with knowledge of the presence of such bystander, as if this, of itself, constituted want of due care, and therefore was, *per se*, actionable negligence. *Shaw v. Lord*..... 347
2. **Same—Question for Jury.** Ordinarily, where a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence; and the question of negligence is for the jury. *Idem*..... 347

ASSESSMENTS—See “Municipal Corporations,” 1-3.

ASSIGNMENTS—See “Bills and Notes,” 1-5; “Chattel Mortgages”; “Set-Off and Counterclaim.”

1. **Check—Effect to Assign Deposit.** Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, *pro tanto*, of the fund before such check has been accepted or certified. **Walters Nat. Bank v. Bantock**..... 153
2. **Same—Check on Particular Fund—Escrows.** A check for the amount of a fund that a trustee had deposited to pay for land, across which the bank had written “in escrow” and had delivered to the cashier pending completion of the sale, held an equitable assignment enabling the payee to recover thereon. **Idem**..... 153

ASSIGNMENTS OF ERROR—See “Appeal and Error,” 26.

ASSUMPTION OF RISK—See “Master and Servant,” 6; “Negligence,” 7; “Trial,” 15.

ATTACHMENT—See “Appeal and Error,” 42, 52; “Chattel Mortgages”; “Landlord and Tenant.”

Sustaining of Attachment—Question for Court or Jury—Law Governing. Whether, in an action begun in Indian Territory before the admission of the territory to statehood, the sustaining of an attachment was for the court or the jury is to be decided by the law in force before the admission to statehood. **Kirby v. Hardin**.... 609

ATTORNEY AND CLIENT—See “Appeal and Error,” 3; “Convicts”; “Injunction”; “Vendor and Purchaser,” 9.

1. **Action Against Attorney for Sums Collected—Peremptory Instruction.** Where, in an executor’s action against an attorney for money collected for the estate and not paid over, defendant testified to collecting \$620, \$220 of which was due him for fees, and that he had the balance, it was not error to instruct the jury to find for plaintiff in a sum not less than \$400. **Baker v. Tate**... 353
2. **Same—Attorney’s Fees.** An instruction relative to determining the reasonable value of the attorney’s fees held not erroneous. **Idem** 353

ATTORNEY’S FEES—See “Attorney and Client”; “Bills and Notes,” 9; “Convicts”; “Pleading,” 4.

BANKRUPTCY—See “Evidence,” 17; “Pleading,” 10.

1. **Assets—Judgment Lien.** A money judgment rendered in a state court pending bankruptcy proceedings does not impose a lien on lands forming a part of the bankrupt’s nonexempt property. **Chambers v. Kirk**..... 696
2. **Discharge—Effect—False Pretenses.** A judgment on a liability for obtaining property by false representations is not released by a discharge in bankruptcy. **Idem**..... 696
3. **Same—Pleading False Pretenses.** An allegation, in a reply answering a claim of discharge in bankruptcy, that the debtor represented at the time he borrowed the money that it would become

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a part of his general assets, and not be converted into an exempt homestead, held not to allege the obtaining of money by false representations so as to relieve the debt from the effect of the discharge. *Idem*..... 696

BANKS AND BANKING—See "Assignments."

1. **Deposit—Right to Appropriate—Trust Fund.** A bank generally has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor. *Walters Nat. Bank v. Bantock*..... 153
2. **Collection of Deposit—Damages From Delay—Burden of Proof.** Where a local bank accepts for collection a deposit in an institution with which it has no business relations, and apparently fails to exercise ordinary diligence to make collection, and the bank having the deposit fails, resulting in loss to the depositor, held, in the depositor's action against it, that the burden is on the local bank to show that its delay was not through its fault, and that no damages resulted therefrom. *Bank of Big Cabin v. English*..... 546
3. **Contract by Cashier—Liability of Bank—Estoppel.** Where a cashier of a bank makes a contract which is beyond his power and authority, but the bank by reason thereof secures a benefit or beneficial effect, it will not thereafter be heard to urge non-liability thereunder on the plea of *ultra vires*. *Crowder State Bank v. Aetna Powder Co.*..... 394

BASTARDS:

1. **Acknowledgment of Paternity—Sufficiency.** For a writing to constitute an acknowledgment of paternity of an illegitimate child, within Rev. Laws 1910, sec. 8420, paternity must be directly and unquestionably acknowledged. *Holloway v. McCormick*..... 1
2. **Same—Letters.** A letter by the alleged father of an illegitimate child to its mother held not an acknowledgment of paternity under Rev. Laws 1910, sec. 8420, though it referred to the child as "my boy" and was signed by the alleged father and written by another at his request. *Idem*..... 1

BIDS—See "Bridges."

BILL OF PARTICULARS—See "Justices of the Peace."

BILLS AND NOTES—See "Assignments"; "Chattel Mortgages"; "Contracts"; "Convicts"; "Evidence," 14; "Railroads," 1; "Sales," 8; "Set-Off and Counterclaim"; "Specific Performance"; "Vendor and Purchaser," 4-7.

1. **Nonnegotiable Note—Defenses.** A nonnegotiable note transferred to an innocent purchaser before maturity for a valuable consideration, without notice to the person liable thereon, is subject to all defenses available against it in the original payee's hands. *Selbold v. Ruble*..... 267

BILLS AND NOTES—Continued.

2. **Same—Action by Assignee—Payment to Payee.** Where a person who assumes the payment of a secured note which is nonnegotiable under Comp. Laws 1909, secs. 4626, 4627, and of the attached interest coupons, has no notice of an assignment thereof, proof of payment to the payee at the designated place is a good defense in an assignee's action to enforce payment. *Idem*----- 28
3. **Same.** Payment to the payee at the designated place in good faith without notice of the assignment of a nonnegotiable mortgage note and coupons, where the assignment was not put of record for over four and one-half years, is a good defense to the assignee's action. *Idem*----- 29
4. **Same.** Where the maker paid a nonnegotiable note to the payee at a designated place without notice of an assignment, that such payee, while acting as agent to procure a new loan and pay off the old, failed to pay over the proceeds of the new loan to the assignee of the note held not to render the maker liable a second time. *Idem*----- 30
5. **Same.** Payment of a nonnegotiable note at the designated place, when made to the ostensible owner who thereupon released the mortgaged premises securing same, held to discharge the maker's liability, though the payment never reached the assignee, and real owner of the note. *Idem*----- 31
6. **Action on Note—Defense—Mental Incapacity from Intoxication.** Evidence, in an action on a note, defended on the ground that it was procured while defendant was mentally incapacitated by intoxication, held to sustain a verdict for defendant. *Straughan v. Cooper*----- 32
7. **Variance—Materiality.** Under Comp. Laws 1909, secs. 5673, 5674, held, that a variance between the original note and the copy attached to the petition, in that the former was dated March 25, 19—, and the latter March 25, 1910, was not material. *Zeno v. Bazzell*----- 33
8. **Extension—Consideration.** Payment after maturity of a note for a sum less than the interest then due held no consideration for a promised extension of the time of payment. *Maker v. Taft*----- 34
9. **Alterations—Materiality.** Note executed in 1909, providing for payment of attorney's fees in case of legal proceedings, was non-negotiable, so that marking out such clause, without the consent of the maker, to render it negotiable, was a material alteration rendering it void in the hands of a bona fide holder. *Farmers' & Merchants' Bank v. Scoggins*----- 35

BONDS—See "Justices of the Peace."

BOOKS OF ACCOUNT—See "Appeal and Error," 36; "Evidence," 5-9.

BRIDGES—See "Counties"; "Injunction"; "Waters and Water Courses."

1. **Contracts With County for Construction—Injunction—Retroactive Laws.** Under Const. art. 5, sec. 52, a cause of action to enjoin issuance of county warrants on claim allowed in payment for county bridges built without advertisement or opportunity for competitive bids, as required by Laws 1903, c. 29, art. 1, sec.

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- 4, is not affected by Laws 1909, c. 32, art. 4, sec. 1, where the suit is brought before the enactment of this latter statute. **Dolezal v. Bostick**..... 743
2. **Same—Necessity of Competitive Bids.** A contract between county commissioners and a bidder for the construction of bridges without advertisement and the opportunity for competitive bids as required by Laws 1903, c. 29, art. 1, sec. 4, held void. **Idem**..... 743
3. **Same—Alteration of Contract.** Alteration of a contract between the county commissioners and a bidder for the construction of bridges without readvertisement and opportunity for competitive bids held void as violative of Laws 1903, c. 29, art. 1, sec. 4. **Idem**..... 743

BRIEFS—See "Appeal and Error," 27-31.

BROKERS—See "Trial," 9.

1. **Authority of Broker—Contract of Sale.** The mere listing of real estate with a broker for the purpose of procuring a purchaser thereof acceptable to the owner does not constitute authority in such broker to bind the owner by an executory contract of sale. **Levy v. Yarbrough**..... 16
2. **Same.** Before a real estate broker can bind the owner by an executory contract of sale, he must have specific authority so to do from the owner. **Idem**..... 16

BURDEN OF PROOF—See "Banks and Banking"; "Corporations," 4; "Husband and Wife," 1, 2, 6; "Negligence," 6; "Sales," 7; "Trial," 9.

CANCELLATION OF INSTRUMENTS:

1. **Conditions Precedent—Return of Consideration.** An offer to return the money received by plaintiff from the sale of part of the goods received from defendant in an exchange held not a condition precedent to plaintiff's right to sue for rescission of the contract, cancellation of his deeds, and return of the money paid by him, where defendant had in his hands moneys paid by plaintiff on the contract in excess of the money which plaintiff had received from the sales. **Rea v. Lewis**..... 708
2. **Sufficiency of Evidence.** Evidence, in an action to rescind a contract for the exchange of property, held to sustain a finding that defendant fraudulently procured the keys to the building containing the stock which he had traded to plaintiff, and took possession of it, and mingled other merchandise with it. **Idem**..... 708

CARRIERS—See "Evidence," 3; "Railroads"; "Telegraphs and Telephones"; "Trial," 7, 10.

1. **"Passenger"—Caretaker of Cattle Shipment.** Where a shipment contract provided that the shipper should have free transportation in consideration of caring for the stock, the shipper was a passenger. **St. Louis & S. F. R. Co. v. Kerns**..... 167
2. **Same—Rights—Injuries—Negligence.** Where a shipment contract provided that the shipper should have free transportation in consideration of his sole care of the stock, and where it became neces-

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- sary for him to enter the stock car at a station to care for the stock, and, while there, he was injured from the negligent running of an engine against the car, held, that the carrier was liable. *Idem* 167
3. **Passengers—Duties of Carrier.** A passenger is entitled to the highest reasonable and practicable skill, care, and diligence from the carrier. *Idem*----- 167
4. **“Passenger”—Licensees and Trespassers.** A person entering a train, without ticket or money to pay fare, to collect an account from a passenger, and remaining after the train leaves the station, is not a passenger. *Chicago, R. I. & P. Ry. Co. v. Evans*... 411
5. **Same—Liability for Wanton Injuries.** A railroad company is liable for injury willfully and wantonly inflicted by its servant on a trespasser or licensee on one of its passenger trains. *Idem*----- 411
6. **Same—Right of Ejectment.** Where a person enters a train, without a ticket or money, to collect an account from a passenger, and remains after the train leaves, and the carrier’s employees eject him, as authorized by Rev. Laws 1910, sec. 813, for failure to pay fare, using only such force as is reasonably necessary, the company is not liable for resulting injuries. *Idem*----- 411
7. **Same.** Where one servant of a carrier, after the carrier’s servants have used reasonable force to eject a trespasser from a passenger train wantonly and willfully catches the trespasser by the feet and causes him to roll down an embankment, the carrier is liable for the resulting injuries. *Idem*----- 411
8. **Injuries to Passengers—Proximate Cause.** Though it may be made to appear that a railroad company is guilty of negligence in the carriage of a passenger, yet, before a recovery can be had for injuries subsequently sustained, and charged to have been the result of such acts of negligence, it must be shown by competent evidence that the acts of negligence were the proximate cause of the injury. *St. Louis & S. F. R. Co. v. Criner*----- 256
9. **Same—Negligence—Evidence.** Where a female passenger suffers a miscarriage some two or three days after arrival at her journey’s end, and where, during the course of the journey, the carrier may have been guilty of negligence, but where there was no competent evidence that the subsequent miscarriage was caused by or resulted from the negligent acts of the railroad, a verdict based partly on proof of miscarriage and attendant suffering cannot be sustained. *Idem*----- 256
10. **Freight—Delay of Shipment—Liability of Initial Carrier.** Though the initial carrier has notice of special damages which will result from any delay, and fails to communicate such notice to the terminal carrier, it is not liable for damages from delay on the terminal line, unless such delay was the result of the failure to communicate the notice. *Atchison, T. & S. F. Ry. Co. v. St. Louis & S. F. R. Co.*----- 80
11. **Same—Proximate Cause—Question for Jury.** Where, in an action against the initial and terminal carriers, it appeared that each had been guilty of negligence, and that plaintiff sustained damages, but the evidence made an issue of fact on the question of which carrier’s negligence was the proximate cause of plaintiff’s injury, it was error to take such question from the jury. *Idem*... 80

CARRIERS—Continued.

12. **Delay in Furnishing Cars—Liability.** Where a shipper has demanded a car for a shipment of sheep and been promised same by the carrier's station agent, and a reasonable time has been taken for furnishing same, further inexcusable delay will render the carrier liable for the resulting damages. **Midland Valley R. Co. v. Larson**..... 360
13. **Same—Demurrer to Evidence.** Where, in an action for damages to a shipment of sheep from delay in furnishing a car, the evidence reasonably tended to show that plaintiff had sustained the damages claimed, and that defendant unlawfully caused same, a demurrer to the evidence was properly overruled. **Idem**..... 360
14. **Damages for Delay—Remittitur—Rehearing.** In action for damages for delay of shipment, remittitur having been filed in accordance with former opinion, petition for rehearing denied. **St. Louis & S. F. R. Co. v. Walker**..... 382
15. **Shipment Contract—Limitation of Liability—Validity.** A provision of a shipment contract that the carrier's liability shall not exceed a maximum valuation held enforceable, when reasonable and entered into in consideration of a lower freight rate. **Missouri, O. & G. Ry. Co. v. Porter**..... 702
16. **Same.** A shipment contract providing, in consideration of a lower freight rate, that the carrier's liability should not exceed a certain maximum valuation, held not invalid as exempting the carrier from liability for its own negligence. **Idem**..... 702

CASE-MADE—See "Appeal and Error," 6, 11, 16, 19-24.

CATTLE—See "Animals."

CHAMPERTY AND MAINTENANCE:

1. **Grants of Land Held Adversely—Validity.** A conveyance of land made in contravention of sections 2214 and 2215, Comp. Laws 1909 (Rev. Laws 1910, secs. 2259 and 2260), is void as against persons holding adversely, either by themselves or tenants, and claiming to be owners of the land under color of title. **Vaughan v. Holder** 101
2. **Same.** A deed from a person out of possession of real property, and who has not been in possession within a year, and who has not within that time taken the rents and profits, is void as against persons in adverse possession. **Idem** 101

CHATTEL MORTGAGES:

1. **Proceeds of Mortgaged Cotton—Compensation for Picking—Right to Retain.** Where a mortgage includes a debtor's entire crop of cotton, without reservation in this regard, he is not entitled to retain from the proceeds of such crop compensation of himself and family for labor in picking same, without the consent of both holder of mortgage and surety. **First Nat. Bank v. Ballard** 553
2. **Priority of Liens—Crops.** The lien for rent given by Rev. Laws 1910, sec. 3806, on crops grown on agricultural land, is superior to a mortgage given by a tenant to a third person on such crops and may be enforced by attachment. **Crump v. Sadler** 26

CHATTEL MORTGAGES—Continued.

3. **Priority of Liens—Payment of Prior Mortgage.** Upon the voluntary payment of a chattel mortgage indebtedness by the mortgagor, a second mortgage on the property included in the original mortgage, *eo instanti*, becomes a first and prior lien thereon, and the holder of such mortgage is entitled to recover possession of the mortgaged property according to the terms of his mortgage. *Ackerman v. C. C. Chapell Hardw. Co.*..... 275
4. **Same—Stipulation Against Second Mortgage—Effect.** A provision in a chattel mortgage that the mortgagor shall not make a second mortgage or lien upon the mortgaged property, without the written consent of the mortgagee, and such consent is neither asked nor given, does not thereby make void, as against one claiming under a second mortgage, a mortgage given in violation of said provision. *Idem* 275
5. **Assignee of Mortgage—Equities Between Parties.** In replevin by the assignee of a nonnegotiable note and a chattel mortgage against the mortgagor to recover possession preliminary to foreclosure, defendant may prove failure of consideration and damages caused by the original payee to defeat the assignee's right of possession, but not to authorize recovery of damages from him. *First State Bank of Mannsville v. Howell*..... 216
Same v. Lawson 226

CHECKS—See "Assignments."

CHILDREN—See "Bastards"; "Habeas Corpus"; "Infants"; "Parent and Child."

CITIES—See "Municipal Corporations."

CIVIL RIGHTS:

Definition. "Civil rights" are broader than political rights and, in the broader sense of the term, are those which are the outgrowth of civilization, and are given, defined, and circumscribed by positive laws necessary to organized government. *Byers v. Sun Savings Bank* 728

COLLECTIONS—See "Attorney and Client"; "Banks and Banking."

COMMERCE:

1. **Foreign Corporations—Right to Sue.** A foreign corporation, engaged in interstate commerce, is not barred by sections 1338 and 1341, Rev. Laws 1910, from maintaining an action on a contract of employment entered into with a citizen of the state of Oklahoma, although it has not filed a copy of its articles of incorporation, etc., with the Secretary of State of the state of Oklahoma, and has not appointed a service agent in the state. *Kirby v. Cubie, Heimann & Co.* 116
2. **Same—Pleading.** Where a defendant in such action, after having answered to the merits, by permission of the court files a supplemental answer setting up these statutes in bar of the action, held that a demurrer to such supplemental answer was properly sustained. *Idem* 116

COMMERCIAL PAPER—See "Bills and Notes."

COMMON CARRIERS—See "Carriers."

COMPROMISE AND SETTLEMENT:

Validity and Enforcement. It is the policy of the law to encourage the settlement and compromise of controversies as a discouragement to litigation. *St. Louis & S. F. R. Co. v. Chester*..... 369

CONDUCT OF COUNSEL—See "Appeal and Error," 4.

CONFIRMATION—See "Execution."

CONSIDERATION—See "Bills and Notes," 8; "Cancellation of Instruments"; "Chattel Mortgages"; "Contracts."

CONSTITUTIONAL LAW—See "Bridges"; "Corporations"; "Courts"; "Death," 14, 17; "Equity"; "Homestead"; "Indians," 5; "Negligence"; "Officers"; "Physicians and Surgeons."

Verdict—Number of Jurors Assenting. Where the cause of action arose before the adoption of the Constitution, but suit was not filed until afterwards, the constitutional provision permitting a verdict to be returned by three-fourths of the jurors applies. *Midland Val. R. Co. v. Larson* 360

CONTINUANCE:

1. **Grounds.** A continuance should be granted only when clearly in furtherance of justice. *Jennings Co. v. Dyer* 468

2. **Same—Sickness of President of Corporation.** That the president of the corporation plaintiff was sick held not ground for continuance within Comp. Laws 1909, sec. 5836 (Rev. Laws 1910, sec. 5045). *Idem* 468

3. **Grounds—Surprise.** Denial of a continuance on the ground of surprise from a statement by plaintiff's counsel in examining jurors, which statement was claimed to disclose ground for removal to federal court, held not error where plaintiff's attorney expressly denied existence of any such ground, and the undisputed evidence showed that no such ground existed. *St. Louis & S. F. R. Co. v. Long*..... 177

4. **Denial—Abuse of Discretion—Absent Witness.** Denial of a continuance sought for absence of plaintiff, who was an important witness, held an abuse of discretion, where his absence was due to being informed by his counsel that the case would be dismissed on his motion, which motion was denied. *Cox v. Kirkwood*..... 704

CONTRACTS—See "Appeal and Error," 37; "Banks and Banking"; "Bills and Notes"; "Bridges"; "Brokers"; "Cancellation of Instruments"; "Carriers"; "Champerty and Maintenance"; "Commerce"; "Compromise and Settlement"; "Convicts"; "Corporations"; "Covenants"; "Damages," 5; "Evidence," 13, 14, 16; "Frauds, Statute Of"; "Husband and Wife," 4-7; "Injunction"; "Insurance"; "Master and Servant"; "Payment"; "Railroads," 2-4; "Reformation of Instruments"; "Release"; "Sales"; "Specific Performance"; "Telegraphs and Telephones"; "Trial," 9; "Use and Occupation"; "Vendor and Purchaser."

1. **Restraint of Trade.** That a contract, the main purpose of which is to promote the business of those making it, incidentally restrains trade will not render it invalid as in restraint of trade. *J. W. Ripy & Son v. Art Wall Paper Mills*..... 20

CONTRACTS—Continued.

2. **Same.** A retailer's agreement to buy a particular line of goods exclusively from a manufacturer for a limited period in a particular locality is not invalid as in restraint of trade. *Idem*..... 20
3. **Agreement Connected With Illegal Contract.** A lawful agreement between parties will be enforced, even though it may be incidentally or indirectly connected with a contract that is illegal, where such lawful agreement is supported by an independent consideration, and can be proven without the aid of the illegal contract. *Walters Nat. Bank v. Bantock*..... 153
4. **Incompetency to Execute—Intoxication.** A person so destitute of reason as not to know the nature or consequences of his act, although such mental condition be the result of his voluntary intoxication, may avoid a contract made by him at such time. *Straughan v. Cooper*..... 515
5. **Railroad Bonus Note—Validity—Public Policy.** A note or obligation payable to a railroad company in aid of the construction of its line between two points, through a certain point, is not void as against public policy. *Coyle v. Arkansas V. & W. Ry. Co.*..... 648

CONTRIBUTORY NEGLIGENCE—See "Death," 7; "Master and Servant," 4; "Negligence," 7; "Trial," 15.

CONVERSION—See "Trove and Conversion."

CONVEYANCES—See "Covenants"; "Deeds"; "Equity"; "Homestead"; "Indians"; "Vendor and Purchaser."

CONVICTS:

- Capacity to Contract—Fees for Obtaining Parole.** A person under sentence and confinement in the penitentiary for a felony held to have power to execute a note secured by a mortgage to an attorney as a fee for obtaining a parole; Rev. Laws 1910, secs. 877, 2813, not depriving him of such power. *Byers v. Sun Savings Bank* 728

CORPORATIONS—See "Banks and Banking"; "Carriers"; "Commerce"; "Continuance"; "Railroads"; "Telegraphs and Telephones."

1. **"Ultra Vires."** There are many shades and distinctions of meaning of the term "ultra vires," but, in its primary sense, it means beyond the scope and power of a corporation to perform under any circumstances or for any purpose. *Crowder State Bank v. Aetna Powder Co.*..... 394
2. **Ultra Vires Contract—Estoppel.** Where a contract made by a corporation outside its legitimate business is executed, and the corporation has received the benefit therefrom, it is estopped to claim that the contract is ultra vires. *Idem*..... 394
3. **Same—Nature of Action on Contract.** An action against a corporation on an ultra vires contract evidenced by a written instrument is not maintained on the instrument, but on the corporation's implied contract to return the property received or place the parties in statu quo. *Idem*..... 394
4. **Proof of Corporate Character.** Where defendant files specific verified denial of plaintiff's corporate character, plaintiff must prove such character. *J. P. Bledsoe & Son v. Keystone Steel & Wire Co.* 536

CORPORATIONS—Continued.

5. **Same—Sufficiency of Evidence.** Evidence held sufficient to show plaintiff's corporate character as against a specific, verified denial. *Idem* 586
6. **Contracts of Foreign Corporation—Validity—License Tax.** Contracts of a foreign corporation, made while it is in default of payment of the license tax required by Laws 1910, c. 57 (Rev. Laws 1910, secs. 7538-7549), held not void or unenforceable under section 1541, where it has complied with the requirements of Const. art. 9, secs. 43, 44, and Comp. Laws 1909, secs. 1538-1540, by filing a copy of its charter and articles, and designating an agent for service. *Smith Bolfe Co. v. Wallace*..... 643

COUNTERCLAIM—See "Set-Off and Counterclaim."

COUNTIES—See "Appeal and Error," 53, 54; "Bridges"; "Injunction."

1. **Proceedings of Commissioners—Statutory Authority.** Where the law prescribes the mode which county commissioners may pursue in the exercise of their powers, all other modes of procedure are ordinarily excluded. *Dolezal v. Bostick*..... 743
2. **Same—Decisions Appealable.** Where county commissioners overruled a protest against the location of a bridge and proceeded to let the contract therefor, held, that such action was not a decision "on a matter properly before it" from which an appeal would lie to the district court under Rev. Laws 1910, sec. 1640. *Parker v. Board of Com'rs of Tillman County*..... 723
3. **Same—Extent of Jurisdiction on Appeal.** On appeal from county commissioners, pursuant to Rev. Laws 1910, sec. 1640, the district court takes appellate jurisdiction only and cannot convert the action into one in equity so as to enlarge its jurisdiction beyond that of the inferior tribunal. *Idem*..... 723

COUNTY ATTORNEYS—See "Appeal and Error," 53, 54; "Injunction."

COUNTY JUDGES—See "Officers."

COURTS—See "Bankruptcy"; "Counties"; "Equity"; "False Imprisonment"; "Justices of the Peace"; "Public Lands"; "Receivers."

1. **Records—Verity—Motion for New Trial.** A journal entry that a motion for new trial was denied on the day filed cannot be attacked on a second motion filed after the time for filing such motion, on the ground that any hearing and order were without opportunity to except, where it does not affirmatively appear that movant's attorney was without notice or knowledge of the court's action. *Boorigie v. Boyd*..... 550
2. **County Court—Probate Jurisdiction.** A county court, co-extensive with the county, is a court of original jurisdiction in all probate matters. *Scott v. McGirth*..... 520
3. **Same—Transfer of Jurisdiction of Territorial Courts—Will Contest.** Where a proceeding to probate a will, instituted in the United States Court at Wewoka, was transferred after statehood to the district court of Seminole county, pursuant to Const. Schedule,

COURTS—Continued.

- sec. 27, and transferred, pursuant to section 23, to the county court of that county, which transferred it to the county court of Hughes county, wherein it was pending when a petition to set aside a probate of the will was filed, held, that it was proper to file the petition in the court last mentioned. *Idem*..... 520
4. **Same—Transfer of Jurisdiction—Records.** Courts of original jurisdiction are deemed successors of all courts of original jurisdiction in the territories, and take custody of all records and files of such territorial courts. *Idem*..... 520

COVENANTS—See “Vendor and Purchaser,” 1-3.

1. **Construction—Renewal Agreement—What Law Governs.** Where an executory contract of sale of land in Indian Territory expired prior to statehood, and a new contract extending the time of performance was executed thereafter, and the deed delivered and notes given for a part of the price, the covenant in the deed should be construed under the law in force when the second contract was made and the deed delivered. *Brady v. Bank of Commerce of Coweta*..... 473
2. **Covenants of Seisin—“Good Right to Convey”—Breach.** “Covenants of seisin” are synonymous with “good right to convey,” as the latter term is used in Comp. Laws 1909, sec. 1202 (Rev. Laws 1910, sec. 1162); and the covenants of such deed, if broken at all, are broken when made, and an actual eviction is unnecessary to consummate the breach. *Idem*..... 473

CROPS—See “Chattel Mortgages”; “Damages”; “Landlord and Tenant”; “Railroads,” 5.

CROSS-EXAMINATION—See “Appeal and Error,” 45.

DAMAGES—See “Appeal and Error,” 47, 58; “Assault and Battery”; “Banks and Banking”; “Carriers”; “Chattel Mortgages”; “Death”; “Eminent Domain”; “False Imprisonment”; “Fraud”; “Frauds, Statute of”; “Husband and Wife”; “Indians,” 4-6; “Libel and Slander”; “Limitation of Actions”; “Malicious Prosecution”; “Master and Servant”; “Municipal Corporations”; “Negligence”; “Parent and Child”; “Railroads”; “Rape”; “Release”; “Replevin”; “Specific Performance”; “Telegraphs and Telephones”; “Trial,” 8, 10; “Trove and Conversion”; “Vendor and Purchaser,” 4-7; “Waters and Water Courses.”

1. **Petition—Sufficiency.** Where the petition, in an action for damages, contains sufficient statements of facts to show the court that plaintiff has sustained a detriment, and the amount thereof, and that defendant had wrongfully caused same, and that it is a detriment for which the law affords redress, such a petition states a cause of action. *Midland Val. R. Co. v. Larson*..... 364
2. **Measure of Damages—Destruction of Crop.** The measure of damages for destruction of a growing crop is the value of the crop in the condition in which it was at the time of its destruction. *Missouri, O. & G. Ry. Co. v. Brown*..... 74
3. **Same.** In determining the value of a growing crop at the time of its destruction, the difference between the probable value of such crop, had it matured and been harvested, and the cost of

DAMAGES—Continued.

- finishing the cultivation, and harvesting, and transportation to market will ordinarily represent the value at the time of loss. *Idem* 70
4. **Same—Labor as Measure.** The value of labor bestowed on a growing crop at the time of its wrongful destruction does not ordinarily afford a proper measure of damages. *Idem*..... 70
5. **Breach of Contract—Supplies for Crop.** In an action for breach of a contract to furnish supplies for the making of a crop, loss of profits or damage to the crop is recoverable when within the contemplation of the parties, and flowing proximately from the breach. **First State Bank of Mannsville v. Howell**..... 216
Same v. Lawson 226
6. **Killing of Cattle—Evidence of Value—Sufficiency.** The testimony examined and held sufficient to prove the market value of the animals killed and injured. **St. Louis & S. F. R. Co. v. Smith** 163
- DEATH—See "Evidence," 12; "Master and Servant," 4; "Municipal Corporations," 10, 11; "Pleading," 7; "Trial," 2.
1. **Presumption of Death Arising from Absence—Evidence.** Evidence, in an action on a benefit insurance certificate, held insufficient to raise the presumption of death of the next of kin of insured arising from an absence from home, unheard of for seven years. **Modern Woodmen of America v. Ghromley**..... 532
2. **Same.** To raise the presumption of death from absence from home, unheard from, for seven years, it is essential that there be a lack of information, after diligent inquiry on the part of those likely to hear. *Idem* 532
3. **Same.** Also that there shall have been an inquiry which exhausts all sources of information which the circumstances suggest. *Idem* 532
4. **Same.** The presumption of death does not authorize an absent person to presume that one left behind has died, especially in the case of the separation of two brothers during their boyhood. *Idem* 532
5. **Wrongful Death—Right of Action—Nature of Right.** St. 1893, sec. 4313 (Rev. Laws 1910, sec. 5281), authorizing recovery for wrongful death, confers upon the beneficiary thereof a property right in the pecuniary value to him of the decedent's life, and gives him a new cause of action for the pecuniary loss which he has sustained from such death. **City of Shawnee v. Cheek**..... 227
6. **Same—Survival.** A cause of action arising under St. 1893, sec. 4313 (Rev. Laws 1910, sec. 5281), for wrongful death, will survive the death of the beneficiary named therein, and may be revived and prosecuted by his administratrix. *Idem*..... 227
7. **Same—Infant Trespasser—Negligence.** In an action for the death of a nine-year-old boy from falling into a pit maintained in a dangerous condition by the defendant city, the character of the decedent's trespass is a circumstance to be considered in ascertaining whether he was guilty of contributory negligence. *Idem* 227
8. **Action for Wrongful Death—Persons Entitled to Sue.** The action for wrongful death can only be brought by the parties

DEATH—Continued.

- designated in sections 4611 and 4612, Wilson's Rev. & Ann. St. 1903 (sections 5281, 5282, Rev. Laws 1910; sections 5945, 5946, Comp. Laws 1909). **Shawnee Gas & Elec. Co. v. Motesenbocker** 454
9. **Same—Joinder of Parties.** Where no personal representative is appointed, and the deceased left no widow, all the next of kin must join in the action. **Idem** 454
10. **Same—"Next of Kin."** By the term "next of kin" is meant all who would have been entitled to share in the distribution of the personal property of the deceased. **Idem** 454
11. **Same.** Where the person for whose death suit is brought left neither widow nor children nor father surviving him, but left a mother and brothers and sisters, the brothers and sisters were next of kin within the meaning of the statute, and must be joined in the action. **Idem** 454
12. **Right of Action—Statutes Conferring—"Detriment."** Comp. Laws 1909, secs. 2881, 2882, providing that every person who suffers detriment from the unlawful act or omission of another may recover damages therefor, and that "detriment" is a loss or harm suffered in person or property, does not confer a right of action for wrongful death; that right depending alone on Wilson's Rev. & Ann. St. 1903, secs. 4611, 4612. **Idem** 454
13. **Same—Separate Action.** Wilson's Rev. & Ann. St. 1903, sec. 4611 (Comp. Laws 1909, sec. 5945; Rev. Laws 1910, sec. 5281), contemplates but one action, and the same death cannot be sued for in separate actions by the various individuals sustaining damage thereby. **Idem** 454
14. **Same—Constitutional Provision.** Const. art. 23, sec. 7, providing that the right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, does not change the method of procedure in such cases. **Idem** 454
15. **Right of Action—Parties.** An action for damages for wrongful death of the husband may be maintained by the surviving wife for the benefit of herself and minor children, under section 5281, Rev. Laws 1910, where there has been no administration on the estate of the deceased. **Big Jack Mining Co. v. Parkinson** 125
16. **Same—Measure of Damages.** In such action the measure of damages is the pecuniary loss suffered by the widow and minor children by reason of being deprived of the care, protection, and support of the deceased, to be determined by the age, physical condition, occupation, earning capacity, habits, and the use made by the deceased of his earnings. **Idem** 125
17. **Damages—Excessiveness.** A recovery of \$15,000 for death of an employee who had earned as much as \$160 a month and was 30 years old, sober and healthy, and who left a wife and small child, held not excessive in view of Const. art. 23, sec. 7 (Williams', sec. 356), providing that the damages for wrongful death shall not be subject to any statutory limitation. **St. Louis & S. F. R. Co. v. Long** 177

DECLARATIONS—See "Evidence," 12; "Husband and Wife," 3.

DEEDS—See “Cancellation of Instruments”; “Champerly and Maintenance”; “Covenants”; “Equity”; “Escrows”; “Estoppel”; “Homestead”; “Indians,” 9; “Mortgages”; “Taxation”; “Vendor and Purchaser.”

DEFAULT JUDGMENT—See “Judgment,” 1-3.

DELIVERY—See “Escrows”; “Sales,” 2.

DEMURRER—See “Appeal and Error,” 12, 13; “Pleading,” 3, 4; “Wills.”

Demurrer to Evidence—See “Appeal and Error,” 2, 8; “Carriers,” 13; “Judgment,” 4; “Trial,” 3.

DENIALS—See “Corporations,” 4, 5; “Pleading.”

DEPOSITS—See “Assignments”; “Banks and Banking.”

DESCENT AND DISTRIBUTION—See “Death,” 1-4, 8-11; “Indians,” 9, 10.

1. **Presumption of Heirship.** It is a presumption of law that a person dying intestate has left heirs capable of succeeding to his estate. **Modern Woodmen of Amer. v. Ghromley**----- 532
2. **Rights of Husband After Uxoricide.** That a husband murdered his wife did not preclude him from inheriting her estate. **Comp. Laws 1909, secs. 8984, 8985. Holloway v. McCormick**----- 1

DIRECTION OF VERDICT—See “Appeal and Error,” 8; “Attorney and Client”; “Trial,” 4-6; “Vendor and Purchaser,” 10.

DISCRETIONARY RULINGS—See “Appeal and Error,” 43, 44; “Continuance”; “Justices of the Peace,” 5; “Pleading,” 7; “Trial,” 1, 2.

DISMISSAL—See “Appeal and Error,” 21, 23, 27, 28, 31.

DIVORCE—See “Homestead”; “Lis Pendens.”

1. **Grounds—“Extreme Cruelty.”** Unjustifiable conduct so grievously wounding the wife’s feelings, or so utterly destroying her peace of mind as to seriously impair her health, constitutes extreme cruelty within Rev. Laws 1910, sec. 4962, Comp. Laws 1909, sec. 6172, though no physical violence is inflicted or threatened. **Hildebrand v. Hildebrand** ----- 306
2. **Same.** False and groundless charges of adultery made by a husband against his wife held to constitute extreme cruelty within the divorce statute (Rev. Laws 1910, sec. 4962, Comp. Laws 1909, sec. 6172). **Idem** ----- 306
3. **Same—Alimony—Discretion.** Where a divorce is granted to the wife for the husband’s fault, alimony is to be allowed in the court’s discretion. **Idem**----- 306
4. **Same.** An allowance, as alimony to the wife, of property worth approximately \$10,000, mainly the homestead, where the remainder of the husband’s estate, exclusive of life insurance policies, was between \$7,500 and \$8,000, and the wife was given the custody of three minor children, held not an abuse of discretion. **Idem** 306
5. **Abandonment—Sufficiency of Petition—Motion to Vacate.** Petition for divorce for abandonment held sufficient as against objection made on a motion to vacate judgment. **Pratt v. Pratt**----- 577

DIVORCE—Continued.

6. **Time for Appeal—Orders on Division of Property.** Rev. Laws 1910, sec. 4971, relating to notice of appeal in divorce, applies only where the appeal is from the decree of divorce, and not where it is from an order awarding alimony or making division of property. **Montgomery v. Montgomery**-----

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DURESS—See "Husband and Wife," 5.

EASEMENTS—See "Municipal Corporations," 6, 7.

ELECTRICITY—See "Evidence," 12.

EMINENT DOMAIN:

Recovery of Damages—Conclusiveness. The fact that a railroad company acquired a right of way by act of Congress prior to statehood, under the terms of which the land covered by such right of way was appraised and the damages arising from the ordinary inconveniences resulting from a railroad running across one's land were assessed, does not grant to such railroad company an absolute immunity forever against damages resulting to abutting land-owners from a negligent construction of railroad embankments across waterways. **Atchison, T. & S. F. Ry. Co. v. Eldridge**-----

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EMPLOYMENT—See "Master and Servant"; "Trade Unions."

EQUITY—See "Assignments"; "Cancellation of Instruments"; "Counties"; "Estoppel"; "Forcible Entry and Detainer"; "Husband and Wife," 4, 5; "Injunction"; "Public Lands"; "Reformation of Instruments"; "Set-Off and Counterclaim"; "Specific Performance."

1. **Adequate Remedy at Law.** Courts of equity will not grant relief where complainants have a plain, speedy, and adequate remedy for redress of their grievances at law. **Turner v. City of Ardmore**
2. **Retention of Jurisdiction—Complete Relief.** Where equity has obtained jurisdiction, it will retain same for administering complete relief as to the subject-matter and to avoid multiplicity of suits. **Cook v. Warner**-----
3. **Same—District Court—Incidental Jurisdiction Over Minors.** Under Williams' Const. art. 7, secs. 10, 12, 13, relative to the jurisdiction of county and district courts, and in view of Rev. Laws 1910, secs. 4646-4648, classifying and defining actions, where the district court acquires jurisdiction of a suit involving title to realty, cancellation of conveyances, and interest of parties to partition, the fact that a minor has an interest in the land will not divest such court of jurisdiction to decree a sale of same, and a sheriff's deed under an order of sale in such a case will be valid, although the minor's undivided interest be conveyed. **Idem**-----

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ESCROWS—See "Assignments."

1. **Time When Deed Takes Effect—Delivery.** A deed of conveyance of real estate placed in escrow when made and duly delivered to the grantee at a subsequent date, when there has been compliance

ESCROWS—Continued.

- with the conditions of the escrow agreement, will ordinarily take effect at the time of such final delivery, and not before. **McMurtrey v. Bridges**..... 264
2. **Same—Warranty Against Taxes—Construction.** A warranty against taxes "at time of delivery," in deed conveying real estate, refers to and so warrants at time of final and due delivery from escrow, in which deed had been placed when made. **Idem**... 264
3. **Same—Action by Grantee—Right of Recovery.** A petition by a grantee, in deed warranting land conveyed against taxes at the time of its delivery, to recover from the grantor the amount of taxes which became due and a lien upon the land between the time the deed was made and placed in escrow and the time it was duly delivered therefrom, the petitioner having paid such taxes after final delivery of the deed to him, is not insufficient merely because such taxes had not become due nor a lien upon the land when said deed was made and placed in escrow. **Idem**... 264

ESTATES—See "Death"; "Descent and Distribution"; "Wills."

ESTOPPEL—See "Banks and Banking"; "Corporations," 2; "Judgment," 9-11.

1. **Equitable Estoppel—Sale of Homestead—Right to Recover.** Where a husband, before making final proof, conveyed to a school board, by a deed in which his wife did not join, as required by St. 1893, sec. 1627, three acres of the homestead, and where the board improved the property, and held possession for several years, without objection from husband or wife, held, that both husband and wife were estopped from recovering the property. **Brusha v. Board of Education of Oklahoma City**..... 595
2. **Married Women—Removal of Disability.** Under Comp. Laws 1909, sec. 3655 (St. 1893, sec. 2978), a married woman is under no disability by reason of coverture, and hence, is under the same rule of estoppel as any other person *sui juris*. **Idem**..... 595

EVIDENCE—See "Appeal and Error," 1, 2, 7, 8, 17, 24, 25, 33-42, 45-48, 49, 55, 56, 60; "Cancellation of Instruments"; "Carriers," 13; "Corporations," 4, 5; "Damages," 6; "Death," 1-4; "Husband and Wife"; "Libel and Slander"; "Malicious Prosecution"; "Marriage"; "Negligence," 4; "New Trial"; "Pleading," 1; "Principal and Agent"; "Railroads," 8; "Release"; "Rewards"; "Sales," 3; "Trial"; "Vendor and Purchaser," 10; "Witnesses."

1. **Presumptions—Acts of Officers.** In a suit by one claiming to be the rightful claimant to public land, to enforce his remedy against a person to whom the patent has been issued by the Land Department, all reasonable presumptions will be indulged in support of the department officers. **Johnson v. Riddle**..... 759
2. **Competency—Value of Chattels.** Ordinarily the owner of chattels is qualified, by reason of that relationship, to give his estimate of their value, and where he qualified as knowing the market value of such chattels as hogs, sheep, cattle, and horses, it is not error to permit him to so testify. **Midland Val. R. Co. v. Larson**..... 360
3. **Transportation of Shipment—Reasonable Time.** Where a party has been engaged in shipping stock from one point to another over a line of railroad for a period of ten years, during which

EVIDENCE—Continued.

- time he shipped some 30,000 head of stock, and states that he knows the reasonable time required for making the trip, he should be permitted to so testify. *Idem*..... 360
4. **Best and Secondary.** The best evidence the nature of the case will permit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed. *Commercial Union Assur. Co. v. Wolfe*..... 342
5. **Same—Insurance—Lost Books.** Where the last inventory and books of the assured have been lost or stolen through no fault of his, it is not error to admit oral proof to establish the value of the property destroyed by the fire. *Idem*..... 342
6. **Best and Secondary—Entries in Books of Account.** It is competent for one who has personal knowledge of a transaction to testify thereto, although books of account covering the transaction are kept by the creditor. *Whitcomb v. Oller*..... 331
7. **Books of Account—Daybook.** Books of account, consisting of entries made at or near the time of the transactions from reports of salesmen in the form of written memoranda, held "books of original entry" and admissible in evidence as such. *Navarre v. Honea*..... 480
8. **Same.** Where a memorandum of sales was made by each salesman, and each day, in the usual course of business, credit entered by the bookkeeper in a daybook, which was a book of original entry, held, that such daybook was admissible in evidence upon the bookkeeper's testimony alone, under St. 1893, sec. 4277 (Rev. St. 1903, sec. 4574; Comp. Laws 1909, sec. 5907). *Idem*..... 480
9. **Same—Probative Effect.** A book of account is only presumptive and disputable evidence of the correctness of the entries therein appearing. *Idem*..... 480
10. **Documentary Evidence—Hearsay.** It is not error to exclude from evidence a copy of the enrollment records offered for the purpose of proving the age of a Seminole allottee at the time he executed a warranty deed in January, 1905, especially where no predicate has been laid for the admission of secondary or hearsay evidence, and no other proper or sufficient reason being apparent. *Perkins v. Baker*..... 288
11. **Affidavit—Proof of Age.** It is not error to refuse admission in evidence of an affidavit of the deceased mother of an alleged minor, unless it is shown that such affidavit was made in good faith, unbiased by any issue between the parties likely to be affected thereby, and made before the litigation was commenced in which such evidence is to be used. *Idem*..... 288
12. **Declarations of Third Person—Hearsay.** In a joint action against an electric light company and a city for wrongful death caused by coming in contact with a live guy wire, it was error to admit in evidence as against the light company a resolution of the city council reciting that the electric company was negligently permitting its wires to be in a dangerous condition. *Shawnee Gas & Electric Co. v. Motesenbocker*..... 454
13. **Parol Testimony Affecting Written Contract.** In the absence of allegations of fraud, duress, accident, or mistake, testimony tend-

EVIDENCE—Continued.

- ing to vary the condition or consideration plainly incorporated in a written contract is not admissible. **Coyle v. Arkansas V. & W. Ry. Co.**----- 648
14. **Same—Railroad Bonus Note.** In the absence of fraud, accident, or mistake, no contemporaneous parol condition or consideration may be ingrafted into a contract to pay a railway bonus. **Idem.**--- 648
15. **Parol Evidence—Proceedings of Annual School Meeting.** Parol evidence is admissible to show that a motion was carried at an annual school meeting to sell certain lumber, where the minutes, kept under Comp. Laws 1909, sec. 8087, fail to mention same and show on their face that they are a mere abstract of what occurred at the meeting. **Gilmer v. School Dist. No. 28, Noble County**----- 12
16. **Same—Written Lease.** Where a written rental contract has been entered into, oral proof of a prior parol contract, being evidence tending to vary and contradict the terms of the written instrument, is incompetent. **Kirby v. Hardin**----- 609
17. **Same—Records—Judgment Against Bankrupt.** In the absence of ambiguity, oral evidence of the character of the claim is inadmissible to supplement the record of an action wherein judgment was obtained against the bankrupt pending bankruptcy proceedings. **Chambers v. Kirk**----- 696
18. **Opinion Evidence—Necessity.** Where the injuries are of such character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science, and must necessarily be determined by the testimony of skilled professional persons. **St. Louis & S. F. R. Co. v. Criner**----- 256

EXCEPTIONS—See “Appeal and Error,” 2-6, 10, 19; “Execution”; “Trial,” 16.

Exceptions, Bill Of—See “Appeal and Error,” 6, 16.

EXCESSIVE VERDICT—See “Death,” 17.

EXECUTION—See “Homestead.”

Confirmation—Action to Set Aside—Right of Action. A person who has filed exceptions to the confirmation of an execution sale, which exceptions have been overruled, cannot thereafter sue to have the confirmation set aside on other grounds, without alleging that he had no information as to such grounds when he filed his exceptions, and without showing that his substantial rights were affected by the confirmation. **Walton v. Kennamer**----- 675

EXECUTORS AND ADMINISTRATORS—See “Attorney and Client”; “Death,” 6, 15.

EXEMPTIONS—See “Bankruptcy”; “Homestead.”

EXPERT EVIDENCE—See “Evidence,” 18.

EXTENSIONS—See “Bills and Notes,” 8.

FALSE IMPRISONMENT:

1. **Liability for Judicial Acts—Justices of the Peace.** Where a justice of the peace has not acted maliciously or corruptly or with-

FALSE IMPRISONMENT—Continued.

- out jurisdiction, he is not liable for damages for false imprisonment, though he has erroneously exercised or exceeded his judicial power. **Flint v. Lonsdale**----- 448
2. **Same.** A justice of the peace is no more liable for false imprisonment than are judges of superior courts. **Idem**----- 448

FALSE PRETENSES—See "Bankruptcy."

FENCES—See "Indians," 7; "Railroads," 6, 7, 10.

FINDINGS—See "Appeal and Error," 37; "Trial," 17, 18.

FIRE INSURANCE—See "Insurance," 6-10.

FORCIBLE ENTRY AND DETAINER:

1. **Nature of Action—Possession.** An unlawful detainer suit brought in Indian Territory under Mansfield's Dig. sec. 3365, was a proceeding at law relating solely to the question of possession and not involving equitable jurisdiction or title. **Johnson v. Riddle**... 750
2. **Right of Action—Procurement of Possession.** A lessor in possession through his tenants may maintain forcible entry and detainer against a person who, at the expiration of the tenancy but before the tenants have moved, went upon the land without objection from the tenants and claimed title superior to that of plaintiff. **Bilby v. Brown**----- 98

FORECLOSURE—See "Chattel Mortgages"; "Pleading," 4.

FOREIGN CORPORATIONS—See "Commerce"; "Corporations."

FRATERNAL INSURANCE—See "Insurance," 1-5.

FRAUD—See "Appeal and Error," 35; "Husband and Wife," 5; "Judgment," 5-8; "Release"; "Sales," 4-7; "Trial," 9.

Damages—Petition—Sufficiency. Petition in action for damages from fraud in connection with an exchange of properties, held to create a cause of action. **Lamb v. Dodson**----- 639

FRAUDS, STATUTE OF:

1. **Parol Agreement—Right to Enforce—Sale of Land.** A parol agreement for the sale of lands will be enforced by the courts where the vendee has paid the purchase price, and taken possession, in good faith, of the premises with the knowledge and consent of the owner, and has made permanent improvements thereon. **Levy v. Yarbrough**----- 16
2. **Same.** But the mere acceptance of the purchase price under an oral contract is not of itself sufficient to take the sale out of the statute of frauds; nor is the fact that the owner orders an abstract of the property to be made. **Idem**----- 16
3. **Parol Contract for Sale of Land—Damages for Breach.** An oral contract for the purchase or sale of realty being void under the statute of frauds, damages for breach thereof cannot be recovered. **Farmers' State Bank v. Cox**----- 672

GUARDIAN AND WARD—See "Indians," 8.

HABEAS CORPUS:

1. **Custody of Child—Right of Mother.** The right of the mother of a minor child, its father being dead, to its custody and control, is superior to that of a third person who has supported and cared for the child for two or three years. *In re Butler*..... 629
2. **Same.** A third person whose wife undertook the care of an infant child for an uncertain compensation, and cared for and supported it for two or three years, held to have no legal right to the child's custody as against its mother. *Idem*..... 629

HARMLESS ERROR—See "Appeal and Error," 45-53.

HEARSAY—See "Appeal and Error," 56; "Evidence," 10, 12.

HEIRS—See "Death"; "Descent and Distribution."

HIGHWAYS—See "Indians," 4-6; "Railroads," 6-8.

"Public Highway." A "public highway," as distinguished from a private road, is one which is open to the travel of the public; it is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway. *St. Louis & S. F. R. Co. v. Smith*..... 163

HOMESTEAD—See "Bankruptcy"; "Estoppel"; "Lis Pendens."

1. **Selection—Intent—Exemption.** The mere intent to create a home on a vacant lot, unaccompanied by actual occupancy, is insufficient to form the basis of a claim of homestead exemption under Const. art. 12, sec. 1, and Rev. Laws 1910, sec. 3342. *Laurie v. Crouch*..... 589
2. **Same.** A fixed intention to presently occupy a lot as a home, accompanied by overt acts clearly manifesting such intention, followed by actual occupancy without unreasonable delay, may impress the lot with a homestead character sufficient, under Const. art. 12, sec. 1, and Rev. Laws 1910, sec. 3342, relative to homestead exemption, to entitle the owner to enjoin its sale under execution for claims arising prior to such occupancy. *Idem*..... 589
3. **Title—Conveyance by Husband—Validity.** Where a decree has been denied both parties in a divorce case, but the wife has been enjoined from interfering with the husband's possession of the homestead, she is not thereby divested of her homestead right, and the husband's attempt to sell the homestead without her consent is void. *McWhorter v. Brady*..... 383
4. **Same.** Where, in litigation between husband and wife, a decree vested title to the homestead in him in trust for the children, a deed by him without joinder of the wife conveyed no title. *Idem*..... 383
5. **Same.** Under Rev. Laws 1910, sec. 1145, a homestead, the title of which is in the husband, cannot be alienated by him without the wife joining, where she has not voluntarily abandoned him or, for any cause, taken up her residence out of the state for one year or more. *Idem*..... 383

HOMICIDE—See "Descent and Distribution."

HUSBAND AND WIFE—See "Death," 15-17; "Descent and Distribution"; "Estoppel"; "Homestead"; "Marriage."

HUSBAND AND WIFE—Continued.

1. **Alienation of Affections—Burden of Proof.** In a wife's action against her husband's parents for alienation of affections, the burden is on plaintiff to show a direct interference, and that defendants were inspired by malice. *Brison v. McKellop*----- 374
2. **Same.** In a wife's action against her husband's parents, much stronger proof of improper motive is required than where such an action is brought against a stranger. *Idem* ----- 374
3. **Same—Declarations.** Evidence of declarations made by the husband in the absence of defendants as to the cause of his abandoning his wife was improperly admitted. *Idem*----- 374
4. **Separation Agreement—Requisites.** A separation agreement is not binding on the wife, unless just and equitable in view of existing circumstances. *Montgomery v. Montgomery* ----- 581
5. **Same—Rescission.** A separation agreement procured by fraud or duress, or voidable upon other equitable ground, is subject to rescission in equity the same as any other contract. *Idem*----- 581
6. **Same—Agreement as Defense to Subsequent Suit—Burden of Proof.** Where the husband sets up a prior written contract of settlement as a defense against any further division of the property acquired through their joint efforts, he must show that such contract was fairly entered into, and that it is just. *Idem* 581
7. **Same—Rescission—Sufficiency of Evidence.** Evidence held to justify the court in annulling a contract of settlement. *Idem*----- 581

ILLEGITIMACY—See “Bastards.”

IMPROVEMENTS—See “Indians,” 4-7; “Public Lands.”

INDEPENDENT CONTRACTORS—See “Master and Servant,” 5.

INDIANS—See “Evidence,” 10; “Marriage”; “Public Lands.”

1. **Cherokee Allotments—Cancellation.** Cherokee lands not segregated from allotment, as provided by Curtis Bill, sec. 25, held subject to allotment; and hence, in the absence of fraud, a filing on such land could not be canceled after nine months from date of filing. *White v. Starbuck*----- 50
2. **Same—Sale of Improvements by Delawares.** Act April 21, 1904, and Act March 3, 1905, authorizing Delaware Indians to sell improvements on excess lands rightfully in their possession on the date of the prior act, did not give them the right to sell improvements on lands which had been allotted to, and were in the possession of Cherokees more than a year prior to such date. *Idem*----- 50
3. **Same—Action to Establish Trust—Petition.** The petition in a Cherokee Indian's action to establish a trust in land based on an erroneous action of the department held sufficient to state a cause of action, where it sets forth with particularity the acts of the department, including the evidence on which it acted. *Idem* 50
4. **Cherokee Allotments—Establishment of Highways—Damages.** Where improvements are damaged by the establishment of public highways pursuant to Cherokee Allotment Act of July 1, 1902, sec. 37, such damages must be determined and paid for as in such section provided. *Edmondson v. Francisco*----- 556

INDIANS—Continued.

5. **Same.** Under Const. art. 2, sec. 24, a road overseer cannot open section lines in the Cherokee Nation over valuable improvements placed there before allotment, where it would materially damage such improvements, unless the damages have first been determined and paid for. *Idem*..... 556
6. **Same—Injunction.** In such case a road overseer may be enjoined from opening up section lines to the damage of improvements, where no steps have been taken to determine the damage or pay therefor. *Idem*..... 556
7. **Chickasaw Allotments—Removal of Fences.** A Chickasaw citizen, who had fenced more land than he could take by allotment, held entitled to remove his fencing within a reasonable time after the excess land was allotted to another. *Trueblood v. Johnson*..... 670
8. **Choctaw Allotments—Conveyances—Married Female Minor.** The marriage of a female member of the Choctaw Tribe of Indians, under the age of eighteen years, does not affect the restrictions imposed by the act of Congress against the sale of her allotments during minority, and a conveyance by such minor of her allotments without the supervision of the probate court is void, notwithstanding her marriage prior to the execution of such conveyance. *Dodd v. Cook*..... 105
9. **Creek Allotments—Conveyances—Descent and Distribution.** Where a Creek Indian entitled to be enrolled under Act Cong. June 28, 1898, sec. 21, died after April 1, 1899, but before receiving his allotment, his lands descended to his heirs, pursuant to the Original Treaty of March 1, 1901, with the Creek Indians, sec. 28, free from restrictions upon alienation imposed by section 7 of such treaty and section 16 of the Supplemental Treaty of June 30, 1902, and a warranty deed of such heirs after allotment to them conveyed the fee-simple title. *Bilby v. Gilliland*..... 678
10. **Peorias—Descent and Distribution—What Law Governs.** Heirs of a Peoria Indian who died in 1906 inherited under the Arkansas law of descent and distribution prescribed in Mansf. Dig. secs. 2522-2545, and made applicable by Act April 28, 1904, c. 1824, 33 St. at L. 573, to all persons in the Indian Territory. *Labadie v. Smith*..... 773

INFANTS—See “Death,” 7; “Equity”; “Habeas Corpus”; “Negligence,” 2, 3; “Parent and Child”; “Wills.”

INHERITANCE—See “Descent and Distribution.”

INJUNCTION—See “Bridges”; “Homestead”; “Indians,” 6; “Municipal Corporations,” 3.

1. **Enforcement of Occupation Tax—Remedy at Law.** Injunction will not lie to restrain a prosecution by a city for failure to pay occupation taxes, there being an adequate remedy by appeal from the municipal court. *Turner v. City of Ardmore*..... 660
2. **Issuance of County Warrants—Bridge Contract.** Injunction will lie to restrain a county clerk from issuing a warrant in payment of a claim allowed by the county commissioners for the construction of bridges under a void contract. *Dolezal v. Bostick*... 743

INJUNCTION—Continued.

3. **Same—Parties—County Attorney.** In view of St. 1893, sec. 1649 (Rev. Laws 1910, sec. 1500), and in the absence of any statute so authorizing, a county attorney cannot sue in his official name to enjoin issuance of warrants for constructions of bridges under a void contract. *Idem*..... 743
4. **Same—Authority of Oklahoma Territory.** Under St. 1893, secs. 1646, 1648, 1649, the territory of Oklahoma has sufficient interest to enable it to enjoin county officers from unlawfully expending county money. *Idem*..... 743
5. **Same—Proper Parties.** A county officer, prior to statehood, was authorized to sue in the name of the territory to enjoin the county clerk from issuing warrants for the misapplication of county funds. *Idem*..... 743

INNOCENT PURCHASERS—See “Bills and Notes,” 1-5, 9.

INSOLVENCY—See “Bankruptcy”; “Sales,” 3.

Definition. Aside from the classes of cases controlled by sections 231 and 4153, Comp. Laws 1909 (sections 215 and 3859, Rev. Laws 1910), it may be generally said that insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business. *Oklahoma Moline Plow Co. v. Smith*..... 498

INSTRUCTIONS—See “Appeal and Error,” 5, 25, 34, 47, 49-52, 58; “Attorney and Client”; “Trial.”

INSURANCE—See “Appeal and Error,” 36; “Evidence,” 5; “Judgment,” 6.

1. **Fraternal Benefit Society—Effect of Regulations—Contract of Insurance.** The terms of a contract between a fraternal benefit society and its members are to be determined by the constitution and laws of the society as they exist at the beginning of the membership, and as they may be lawfully amended from time to time thereafter, and by agreement made pursuant thereto between the incoming members and the society. *Hines v. Modern Woodmen of Amer.*..... 135
2. **Same—Power to Change Regulations.** The power accorded to such a society in its charter to alter and repeal its constitution, by-laws, rules and regulations enters into and forms part of the contract of insurance between the society and its members, when the latter, as applicants for membership, promise not only to conform to and abide by the constitution and laws of the society as they then exist but also as they may be thereafter altered or amended. *Idem*..... 135
3. **Same—Right to Change Regulations.** Such reserve power of amendment and repeal does not, however, give the society any right to adopt a by-law which will divest, impair, or disturb the rights once vested in its members, for such a by-law would be unreasonable. *Idem*..... 135
4. **Same—Fraternal Benefit Certificate—Rights of Beneficiary.** A beneficiary named in a fraternal benefit certificate only acquires a vested right in the benefits accruing thereunder on the member's death. *Idem*..... 135

INSURANCE—Continued.

5. **Same—Change of By-Laws—Effect of Death of Beneficiary.** Where a benefit certificate payable to the member's heirs unless his mother survived him was issued subject to power to change the by-laws, **held**, that an amendment to the by-laws providing that, on the death of a named beneficiary and failure of the member to make a new designation, his wife should take in preference to his heirs, controlled. *Idem*..... 135
6. **Fire Insurance—Action on Policy—Answer—Sufficiency—Election to Cancel.** Answer, in an action on a fire policy authorizing cancellation for the taking out of additional insurance without permission, **held** demurrable. *St. Paul Fire & Marine Ins. Co. v. Bragg*..... 146
7. **Fire Insurance—Contracts—Authority of Soliciting Agent.** A traveling soliciting agent ordinarily has no implied authority to enter into a contract of insurance, though supplied by the company with printed blank forms of application. *Dorman v. Connecticut Fire Ins. Co.*..... 509
8. **Essentials of Contract.** It is essential to a valid contract of insurance that the minds of the parties shall have met as to the subject-matter, the risk insured against, the period of risk, the amount of insurance, and the premium. *Idem*..... 509
9. **Same—Unaccepted Application—Retention of Premium.** An unaccepted application, accompanied by the premium, though retained without notice of objection for five days and until the applicant has suffered loss, is not a contract of insurance. *Idem*..... 509
10. **Same.** Soliciting agent's retention of both application and premium pending submission of the application to the insurance company's state agent for acceptance or rejection **held** not an acceptance constituting a contract of insurance. *Idem*..... 509

INTERSTATE COMMERCE—See "Commerce."

INTOXICATION—See "Bills and Notes," 6; "Contracts," 4.

JUDGES—See "False Imprisonment"; "Officers"; "Receivers."

JUDGMENT—See "Appeal and Error"; "Appearance"; "Bankruptcy"; "Death," 17; "Divorce"; "Evidence," 17; "Pleading," 8-10.

1. **Default—Pleading Undisposed Of.** There can be no judgment by default where there is any pleading raising an issue of law or fact. *Crossan v. Cooper*..... 281
2. **Same.** Before a judgment can be entered, the answer or other plea must be disposed of by way of motion, demurrer, or in some other manner. *Idem*..... 281
3. **Same—Limitations.** Where petition to recover on a foreign judgment showed that the cause of action was barred by limitations, an answer specifically set up such bar, but the court entered a purported default judgment and a trial was had, and the only evidence introduced was copies of the pleadings and the original judgment, **held** that, the defense being sufficient, it was reversible error to render judgment for plaintiff. *Idem*..... 281

JUDGMENT—Continued.

4. **Judgment After Demurrer to Evidence.** Under Comp. Laws 1909, sec. 5794, the court properly entered judgment for defendant after sustaining a demurrer to plaintiff's evidence. *Oklahoma Moline Plow Co. v. Smith*..... 493
5. **Vacation—Fraud—Perjury.** Before a judgment rendered on perjured testimony will be vacated under Rev. Laws 1910, sec. 5267, it must appear that the injured party has presented the matter with due diligence, and is clearly entitled to the relief sought, that the question of perjury could not have been litigated at the trial, or the relief sought obtained therein by the use of due diligence. *El Reno Mut. Fire Ins. Co. v. Sutton*..... 297
6. **Same—Insurance Loss.** Where plaintiff had removed the insured goods from the state before the fire, and recovered on her testimony that they had been burned, and the defendant, relying on plaintiff's allegations, sought only to minimize the amount of plaintiff's loss, plaintiff's perjured testimony constituted a fraud authorizing vacation of the judgment under Rev. Laws 1910, sec. 5267, subd. 4. *Idem*..... 297
7. **Same.** The obtaining of a judgment by willful perjury is obtaining it by fraud within Rev. Laws 1910, sec. 5267, subd. 4, authorizing the vacation of judgments obtained by fraud. *Idem*.... 297
8. **Same.** Where the unsuccessful party has been prevented by fraud and perjury, from exhibiting fully his case, and there has never been a real contest, the judgment may be set aside. *Idem*..... 297
9. **Jurisdiction—Determination of Question.** Where the question of jurisdiction over defendant was directly put in issue by defendant's motion to vacate a former judgment, the judgment overruling the motion was conclusive on the question of jurisdiction in a subsequent trial between the same parties. *McDuffie v. Geisler Mfg. Co.*..... 488
10. **Same—Res Judicata.** A question in issue in a former suit and there determined cannot be again litigated in any future action by the same parties or their privies upon the same or a different cause of action. *Idem*..... 488
11. **Same—Basis of Estoppel.** Whether there is estoppel by a judgment depends on whether there has been a judicial determination of a fact and not on what evidence or by what means the determination was reached. *Idem*..... 488
12. **Same—Extent of Estoppel.** The inquiry of *res adjudicata* extends beyond the mere formal judgment to the pleadings, verdict, or findings. *Idem*..... 488

JUDICIAL SALES—See "Equity"; "Execution"; "Homestead."

JURISDICTION—See "Counties"; "Courts"; "Equity"; "Judgment," 9-12; "Lis Pendens"; "Public Lands"; "Receivers."

JURY—See "Appeal and Error," 50; "Constitutional Law."

JUSTICES OF THE PEACE—See "False Imprisonment."

1. **Process—Amendments.** A summons in a justice court against a partnership, which does not show the individual name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment. *Red River Valley Cotton Co. v. J. W. Stalcup Merc. Co.*..... 34

JUSTICES OF THE PEACE—Continued.

2. **Same—Appeal—Appearance—Waiver of Defects in Process.** In an action against a partnership in the firm name alone, where the pleadings show the individual names composing the firm, although the individuals are not personally served with summons, but voluntarily appear and join in a demurrer to the bill of particulars, on the ground that no cause of action is stated and that no one has been sued in the action, **held**, it is error to sustain such demurrer. **Idem** 34
3. **Pleadings—Sufficiency—Appeal.** The same degree of particularity in pleadings is not required in actions before a justice of the peace that is required in courts of record, and a pleading that is sufficient in a justice's court is sufficient in the appellate court, where the cause is tried *de novo* upon appeal. **Whitcomb v. Oller** 331
4. **Bill of Particulars—Necessity—Replevin.** That no bill of particulars as provided for in Rev. Laws 1910, sec. 5414, was filed in replevin was not ground for reversal, where the affidavit conformed to Rev. Laws 1910, sec. 5399, and contained everything necessary to be stated in a bill of particulars and no objection was made in justice court. **Ackerman v. C. C. Chapell Hardware Co.**..... 275
5. **Appeal—New Pleadings—Discretion.** Under Rev. Laws 1910, sec. 5467, the right to new pleadings in a county court on appeal from a justice depends on whether it is in furtherance of justice to permit them, and the matter is to be in the discretion of the court. **Idem** 275
6. **Appeal Bond—Liability of Sureties.** That the county court rendered judgment for one defendant and against the other **held** not to preclude entry of judgment pursuant to Comp. Laws 1909, sec. 6398, against the sureties on an appeal bond filed by both defendants on an appeal from a justice of the peace. **Farmers' Loan & Trust Co. v. Loyd**..... 569

LABOR—See "Work and Labor."

LANDLORD AND TENANT—See "Chattel Mortgages"; "Evidence," 16; "Forcible Entry and Detainer"; "Use and Occupation."

1. **Crop Rent—When Payable.** Crop rent for the use of agricultural lands is payable when the crop is ready for harvesting and market and not merely "within a reasonable time" after removal of part of the crop from the premises. **Crump v. Sadler**..... 26
2. **Same—Enforcement of Lien—Attachment.** The lien for rent given by Rev. Laws 1910, sec. 3806, on crops grown on agricultural land, may be enforced by attachment. **Idem**..... 26

LAW OF CASE—See "Appeal and Error," 59, 60.

LEASES—See "Evidence," 16.

LIBEL AND SLANDER—See "Appeal and Error," 45, 46.

1. **Libelous Publication—Actionable Words.** Under Rev. St. 1910, sec. 4956, words are actionable when, if taken in their natural sense, they tend to deprive the person mentioned of public confidence and esteem. **Spencer v. Minnick**..... 613

LIBEL AND SLANDER—Continued.

2. **Same.** Under Rev. St. 1910, sec. 4956, words are actionable when they tend to injure in business. **Idem**..... 613
3. **Same.** A person cannot escape liability for a libelous publication by using a question mark after the actionable language. **Idem**..... 613
4. **Same.** Words used in an alleged libelous article are to be taken in their most natural and obvious sense, and in which those to whom they are addressed will be sure to understand them. **Idem**... 613
5. **Same—Source of Information—Justification.** That defendant secured his information from what he considered reliable sources and believed the things published to be true is not admissible in justification. **Idem**..... 613
6. **Same—Mitigation.** That defendant secured his information from what he considered reliable sources and believed the things published to be true is admissible in mitigation. **Idem**..... 613
7. **Same—Pleading—Answer as Admission.** Where defendant's answer admits the publication and pleads the truth, it also admits use of the words with the meaning assigned to them in the petition. **Idem**..... 613
8. **Same—Truth as Defense.** Where the defense in an action for the publication of libelous articles is that the articles are true, plaintiff is entitled to recover unless defendant establishes the truth of every material item. **Idem**..... 613
9. **Same—Privileged Publication—Question of Law.** Whether a publication is libelous or privileged is for the court, where the language used is clear and the facts relative thereto are uncontroverted. **Idem**..... 613
10. **Evidence—Admissibility.** In an action for defamation, evidence that plaintiff has a brother not a party to the action or a witness, who is a fugitive from justice, held incompetent. **Kimberlin v. Ephraim**..... 39

LICENSE—See "Corporations," 6; "Physicians and Surgeons."

LIENS—See "Bankruptcy"; "Chattel Mortgages"; "Landlord and Tenant"; "Mechanics' Liens"; "Mortgages"; "Railroads," 2-4.

LIMITATION OF ACTIONS—See "Judgment," 3.

Damages from Overflow—Railroad Embankment. An action against a railroad company for damages resulting from an overflow caused by the defective construction of the railroad embankments is not barred by limitation because such embankments have been constructed more than two years prior to the injury, but the time in which such action may be brought dates from the time the injuries are received and damages sustained. **Atchison, T. & S. F. Ry. Co. v. Eldridge**..... 463

LIQUIDATED DAMAGES—See "Specific Performance"; "Vendor and Purchaser," 4-7.

LIS PENDENS:

1. **Nature of Doctrine.** The doctrine of *lis pendens* under the common law was based on the theory of public policy, but under the statute dealing therewith (Rev. Laws 1910, sec. 4732) it is treated as an element of the law of notice. **McWhorter v. Brady**..... 383

LIS PENDENS—Continued.

2. **Essential Elements.** It is essential to the existence of a valid *lis pendens* that the property be of a character subject to the rule and that the court have jurisdiction. *Idem*..... 383
3. **Same—Description of Property.** It is essential to the existence of a valid *lis pendens* that the property be sufficiently described in the pleadings. *Idem*..... 383
4. **Same—Action for Divorce and Homestead.** Description of land in a petition for divorce and possession of the homestead held sufficient, though vague, to meet the requirements of a valid *lis pendens*, where it apprised the purchaser of the status of the land and enabled him to identify same and ascertain the object of the suit. *Idem*..... 383

LIVE STOCK—See “Animals.”

LOANS—See “Bills and Notes,” 4.

MALICIOUS PROSECUTION:

1. **Cause of Action—Essentials.** It is essential that defendant shall have maliciously, and without probable cause, instituted or instigated against plaintiff a prosecution which has been legally and finally terminated in plaintiff's favor. *Flamm v. Wineland*... 688
2. **Same—Sufficiency of Evidence.** Evidence held insufficient to show a final determination of the prosecution in plaintiff's favor, or that defendants instituted or instigated the prosecution as alleged. *Idem*..... 688

MANDAMUS:

1. **Petition—Sufficiency.** A petition in mandamus is demurrable where it does not contain allegations of fact which, taken as true, affirmatively show that defendant is under the clear legal duty of doing the thing demanded. *Board of Medical Examiners of Oklahoma v. Gulley*..... 63
2. **Same—License to Practice Medicine.** A petition in mandamus against the board of medical examiners to require the issuance of a license without examination held demurrable, where it failed to show that the board was under any legal duty to issue such license. *Idem*..... 63

MARRIAGE:

1. **Existence—Question for Jury.** The existence of facts essential to a valid marriage is to be determined by the jury trying the case. *Fender v. Segro*..... 318
2. **Same—Presumption—Cohabitation and Reputation.** It was within the province of the jury to say whether a marriage was to be inferred from cohabitation and reputation. *Idem*..... 318
3. **Indians.** Cohabitation and reputation do not constitute marriage, but only evidence tending to raise a presumption of marriage from circumstances; in any case the cohabitation must not be mere-tricious, but matrimonial, to raise the presumption. *Idem*..... 318
4. **Same.** Such presumption of marriage does not arise where it is not shown that there was a recognition of the marriage relation by the parties and a holding out of each other as husband and wife respectively. *Idem*..... 318

MARRIED WOMEN—See “Husband and Wife”; “Indians,” 8.

MASTER AND SERVANT—See “Trade Unions”; “Trial,” 2.

1. **Mine Employees—Duty of Operators.** Sections 3983 and 3984, Rev. Laws 1910, prescribing certain duties of mine operators towards employees, including the duty of daily inspection, applies to the operators of lead and zinc as well as coal mines. **Big Jack Mining Co. v. Parkinson**..... 125
2. **Right to Quit Work.** In the absence of a contract to work for a definite time, an employee has a right to quit whenever he chooses, with or without reason. **Boddy v. United Mine Workers of America**..... 621
3. **Labor Unions—Discharge of Non-Union Employee—Liability for Damages.** Where coal mine employees who are members of a labor union demand that nonunion employees be discharged and threaten to strike unless their demand be complied with, neither the union as an organization nor the members thereof as individuals are liable in damages to a nonunion man who is discharged pursuant to such demand. **Idem**..... 621
4. **Death of Servant—Petition—Sufficiency.** Petition, in an action for the wrongful death of an employee, held not demurrable, where it clearly charged negligence, though it contained statements from which contributory negligence might be inferred. **Duncan Cotton Oil Co. v. Cox**..... 633
5. **Defenses—Acts of Independent Contractor.** In an action for tort, it is no defense that the unlawful act was committed by an independent contractor employed by defendant to commit the same. **Missouri, O. & G. Ry. Co. v. Brown**..... 70
6. **“Assumption of Risk.”** “Assumption of risk” is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant’s duty shall be at the servant’s risk. **St. Louis & S. F. R. Co. v. Long**... 177

MECHANICS’ LIENS:

Property Subject—Public Property. Neither the public buildings nor the land upon which same are situated, whether owned by the state or any subdivision thereof, are subject to the lien authorized by section 4527, St. Okla. 1893 (section 3862, Rev. Laws 1910), as such lien would be against public policy and unenforceable, and such property is not by statute expressly made subject to same. **Minnetonka Lbr. Co. v. Board of Ed. of City of Sapulpa** 541

MENTAL CAPACITY—See “Bills and Notes,” 6; “Contracts,” 4.

MINES AND MINERALS—See “Master and Servant,” 1, 3; “Trade Unions.”

MINORS—See “Infants.”

MISREPRESENTATION—See “Sales,” 4, 5.

MISTAKE—See “Appeal and Error,” 37; “Reformation of Instruments.”

MORTGAGES—See “Bills and Notes,” 2-5; “Chattel Mortgages”; “Convicts”; “Payment”; “Pleading,” 4.

1. **Payment of Taxes—Duty of Mortgagee.** A person holding a mortgage upon real estate as security for a debt is under no obligation to pay the taxes upon such property, unless there is some provision in the mortgage requiring him to do so. **Price v. Salisbury** 416
2. **Tax Sale—Right to Purchase—Mortgagee.** A person holding a mortgage on property may acquire title to the mortgaged premises by the purchase at tax sale and obtaining tax deed therefor. **Idem** 416

MOTIONS—See “New Trial.”

For Judgment on Pleadings—See “Pleading,” 8-10.

To Direct Verdict—See “Direction of Verdict.”

To Strike—See “Pleading,” 3; “Wills.”

To Vacate—See “Appearance”; “Divorce.”

MUNICIPAL CORPORATIONS—See “Evidence,” 12; “Injunction.”

1. **Paving Assessments—Disposition of Funds.** The scheme of the paving law of 1908 (Laws 1907-08, c. 10, art. 1), is to raise only such sum by special assessment as will pay the actual cost of the improvement and not to create a surplus; each year's assessment being designed to take care of its installment and interest and no more. **Spitzer v. City of El Reno**..... 430
2. **Same.** Under the paving law of 1908 (Laws 1907-08, c. 10, art. 1), each lot and parcel of land in the improvement district must pay its share in the total cost and no more, though there be a delinquency on the part of some other property owner. **Idem**... 430
3. **Same—Excessive Assessments—Refund—Injunction.** Where a property owner pays more than his legitimate assessment for paving under the paving laws of 1908 (Laws 1907-08, c. 10, art. 1), the surplus arising from an excessive assessment belongs to him and not to the bondholders, and they cannot enjoin the city from refunding such surplus. **Idem**..... 430
4. **Same.** Sums collected by special assessment in excess of the amount actually needed held not a trust fund within Laws 1907-08, c. 10, art. 1, section 6 (Comp. Laws 1909, sec. 727; Rev. Laws 1910, sec. 642), providing that paving assessments shall constitute a fund to be applied to the payment of “bonds and the interest thereon and for no other purpose.” **Idem**..... 430
5. **Control of Streets—Trees and Wires.** While a city has control over its streets, including spaces occupied by trees and wires thereon, it must exercise such power in good faith and without abuse. **Norman Milling & Grain Co. v. Bethurem**..... 735
6. **Same—Rights of Abutting Owner—Injury to Trees.** An abutting owner has such an equitable easement in trees grown by him on a street the fee to which is in the city as entitles him to sue for wrongful injury thereto depreciating the value of his lot. **Idem**..... 735
7. **Same—Occupancy—Mutual Rights.** Where both the owner of an abutting lot having an equitable easement in trees on a street and the owner of wires thereon are in lawful occupancy of the street, mutual accommodation is due from each to the other, and the lot owner cannot recover for slight injuries to the trees from necessary and reasonable trimming. **Idem**..... 735

MUNICIPAL CORPORATIONS—Continued.

8. **Same—Rights of Abutting Owner—Injury to Trees.** Where an owner of wires voluntarily strung within space potentially occupied by trees grown in the street by the abutting lot owner injuriously cuts back the trees from contact with the wires, he is ordinarily a trespasser *ab initio*, and liable to the abutting owner for all the consequential damages to his lot. *Idem*..... 735
9. **Same—Powers of City—Public Necessity.** Only where public necessity justifies such act may a city authorize an abutting lot owner having an equitable interest in trees growing in the street, or a company which has strung wires in the street, to exclude the other from space first rightfully occupied by the other, and so inflict substantial damage without due compensation. *Idem*..... 735
10. **Dangerous Premises—Negligence—Matters Considered.** In determining whether a city, by permitting a pit filled with water, and covered with a light layer of straw, was guilty of reckless disregard for the safety of an infant trespasser, the attractiveness and accessibility of the pit, the gravity of the danger, the time of its existence, and knowledge imputed to the city by reasonable inference were to be considered. *City of Shawnee v. Cheek*..... 527
11. **Same—Petition—Sufficiency.** In an action for the death of a boy from falling into a pit at an abandoned city pumphouse, which pit was filled with water, and covered with a light layer of straw, petition held demurrable. *Idem*..... 527
12. **Defective Streets—Falling Signs—Personal Injuries—Liability.** Under Rev. Laws 1910, sec. 589, which was extended over the state by the Enabling Act, and requires cities to prevent projections over sidewalks, held, that a city was liable for injury caused by a sign which it permitted to remain above the sidewalk for fourteen months after statehood, though the sign was erected prior to statehood, and though under the laws of Indian Territory the city would not be liable. *City of Purcell v. Stubblefield*..... 532
13. **Same—Defense—"Act of God".** Where a wooden sign, suspended above a sidewalk, is blown down and injures a pedestrian, the city cannot relieve itself from liability on the ground that the injury was caused by an "act of God," unless it also shows that the wind was unprecedented, and the sole cause of the injury. *Idem*..... 532

MURDER—See "Descent and Distribution."

NEGLIGENCE—See "Assault and Battery"; "Carriers"; "Death"; "Eminent Domain"; "Limitation of Actions"; "Master and Servant"; "Municipal Corporations"; "Railroads"; "Telegraphs and Telephones"; "Trial," 2, 6-8, 13-15.

1. **Landowner—Duty to Trespasser.** A landowner owes a trespasser a duty, in respect to safety from a dangerous artificial condition of premises, to not injure him intentionally or wantonly. *City of Shawnee v. Cheek*..... 18
2. **Same—Infant Trespasser.** A mere omission by a landowner to guard against injury to an infant trespasser may constitute actionable negligence when it involves a reckless disregard for his safety. *Idem*..... 18

NEGLIGENCE—Continued.

3. **Same.** A child under seven years of age, or, in the absence of evidence of capacity, between seven and fourteen years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting the question of duty of a landowner as to dangerous condition of the premises. *Idem*..... 227
4. **Subsequent Repairs—Admission of Evidence.** Evidence of alterations or repairs subsequent to an accident or injury is not admissible for the purpose of showing negligence in the original construction, or to show a confession of negligence. *Shawnee Gas & Elec. Co. v. Motesenbocker*..... 454
5. **Proximate Cause—Question for Jury.** The question of what is the proximate cause of an injury, or what is the immediate or proximate result of a given act, is ordinarily one of fact for the jury. *Atchison, T. & S. F. Ry. Co. v. St. Louis & S. F. R. Co.*..... 80
6. **Same—Burden of Proof.** In an action for damages for negligence, the burden is on the plaintiff to prove that the damages proximately resulted from the negligence proven. *Idem*..... 80
7. **Contributory Negligence—Question for Jury.** Under Const. art. 23, sec. 6 (Williams' Const. sec. 355), the defense of contributory negligence and assumption of risk must be left to the jury. *St. Louis & S. F. R. Co. v. Long*..... 177

NEGOTIABLE INSTRUMENTS—See "Bills and Notes."

NEW TRIAL—See "Appeal and Error," 6-11, 14, 15, 19, 26, 32, 43, 44, 59; "Courts."

1. **Motion—Essentials—Diligence.** A motion for a new trial upon the grounds of newly discovered evidence may be denied if facts constituting due diligence to have discovered same in time for the trial had be not stated therein. *Straughan v. Cooper*..... 515
2. **Motion—Amendment.** A motion for a new trial may be amended, after the three days allowed by the statute for filing the motion, by a clearer, more appropriate statement or elaboration of the grounds originally set up; but such an amendment, filed after the statutory time has expired, cannot set up new and independent grounds therefor. *Rogers v. Quabner*..... 107
3. **Second Motion—Sufficiency of Showing.** To authorize granting a second motion for a new trial filed after the expiration of the time for filing such motion, on the ground that movant's attorney was not notified of the hearing on the first motion, and given an opportunity to except, want of notice must appear affirmatively, and not by mere inference. *Boorigie v. Boyd*..... 550

NOTES—See "Bills and Notes."

NOTICE—See "Adverse Possession"; "Bills and Notes," 1-4; "Carriers," 10; "Courts"; "Divorce"; "Lis Pendens"; "New Trial."

OCCUPATION TAXES—See "Injunction."

OFFICERS—See "Counties"; "Evidence," 1; "False Imprisonment"; "Injunction."

1. **County Judge—Salary—Increase During Term.** Act of June 4, 1908 (Laws 1907-08, c. 27, art. 3, sec. 1), held not to apply so as

OFFICERS—Continued.

to increase the salary of the county judge of Beaver county during his term of office ending in January, 1911, since it was not intended for the benefit of "present incumbents," and did not bring them within the limitation "until otherwise provided by law," set out in Williams' Const. art. 25, sec. 18, prescribing the salaries of county officers until otherwise provided by law. **Board of Com'rs of Beaver County v. Culwell**.....

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1. **Same.** The county judge of Beaver county, whose salary was fixed at \$1,200 per year by Sess. Laws 1897, c. 15, sec. 11, and Const. art. 25, sec. 18, and whose term, pursuant to Const. art. 7, sec. 11, terminated in January, 1911, held not entitled to an increase of salary under the act of June 4, 1908; Const. art. 23, sec. 10, forbidding the increase of an officer's salary during his term of office. **Idem**.....

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OPINIONS—See "Evidence," 18.

ORAL—See "Parol."

PARENT AND CHILD—See "Bastards"; "Death"; "Habeas Corpus."

1. **Loss of Services of Child—Damages.** In determining the damages to be awarded a parent for loss of the services of a minor child, the jury may consider that with age, growth, and experience the value of the child's services would increase, though they cannot consider that the child might, if not injured, engage in any particular calling. **Shawnee Gas & Electric Co. v. Motesenbocker**.....

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2. **Same.** In an action by a parent for the loss of the services of a minor child, the damage to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amount expended in the treatment and care of the child, and the value of the parent's services for nursing. **Idem**.....

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PAROL AGREEMENTS—See "Frauds, Statute of"; "Sales," 1.

PAROL EVIDENCE—See "Evidence."

PAROLE—See "Convicts."

PARTNERSHIP—See "Justices of the Peace," 1, 2.

Definition and Nature. Though a partnership is not a person, it is a legal entity under Rev. Laws 1910, secs. 4431-4474, and for some purposes is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly. **Red River Valley Cotton Co. v. J. W. Stalcup Mercantile Co.**.....

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PARTIES—See "Appeal and Error," 53, 54, 57; "Death"; "Injunction."

PASSENGERS—See "Carriers."

PATENTS—See "Public Lands."

PAVING—See "Municipal Corporations," 1-4.

PAYMENT—See “Bills and Notes,” 2-5, 8; “Chattel Mortgages.”	
1. Proceeds of Mortgaged Property—Application. In the absence of consent of mortgage debtor and his surety to make other application, to the extent of the mortgage indebtedness, the proceeds of mortgaged property should be applied as credit thereon. First Nat. Bank v. Ballard	553
2. Same. A creditor who has wrongfully applied proceeds of mortgaged property as credit upon another indebtedness of the mortgagor may, in the absence of any intervening adverse right arising from such wrongful application which would affect the rule, correct his error by transferring such credit to the mortgage secured debt. Idem	553
PERJURY—See “Judgment,” 5-8.	
PERSONAL INJURIES—See “Assault and Battery”; “Carriers,” 4-9; “Death”; “Evidence,” 18; “Municipal Corporations,” 10-13; “Negligence”; “Parent and Child”; “Release”; “Trial,” 8.	
PETITION—See “Pleading.”	
Petition in Error—See “Appeal and Error,” 14.	
PHYSICIANS AND SURGEONS—See “Evidence,” 18; “Mandamus.”	
Right to License Without Examination. A physician whose license was canceled by the territorial Supreme Court for fraud in its procurement, and to whom no other license had been issued, was not entitled to registration under Williams’ Const. art. 5, sec. 39, making physicians practicing in Oklahoma Territory eligible to registration since statehood without examination. Board of Medical Examiners of Oklahoma v. Gulley	63
PLEADING—See “Appeal and Error,” 53, 54; “Bankruptcy”; “Bills and Notes,” 7; “Commerce”; “Corporations,” 4, 5; “Damages,” 1; “Divorce”; “Escrows”; “Fraud”; “Indians,” 3; “Insurance,” 6; “Judgment,” 1-3; “Justices of the Peace”; “Libel and Slander,” 7; “Lis Pendens”; “Mandamus”; “Master and Servant,” 4; “Municipal Corporations,” 11; “Railroads,” 1; “Rewards”; “Use and Occupation”; “Waters and Water Courses”; “Wills.”	
1. Construction—Admission—Effect. An admission, in an adversary’s pleadings, to be available, must be taken with all the qualifying clauses and limitations which the pleader has included in it; in other words, it must be taken as a whole; and, where facts are alleged in connection with an admission which nullify it, its effect as an admission is destroyed. Oklahoma Moline Flour Co. v. Smith	498
2. Effect of General Denial. A general denial puts in issue every fact pleaded. First State Bank of Mannsville v. Howell	216
Same v. Lawson	226
3. Objection—Demurrer—Motion to Strike. Where objections to a pleading or a portion of a pleading are based, not on any irregularity connected with its filing, nor on any matter pertaining merely to its form, but on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer, and not by motion to strike from the pleading the allegations attacked. Halley v. Bowman	294

PLEADING—Continued.

4. **Petition—Sufficiency Against General Demurrer.** Where the separate paragraphs of a petition sufficiently state a cause of action for debt and mortgage foreclosure, and in addition thereto it is sought to recover attorney's fees as provided for in the mortgage sought to be foreclosed, a general demurrer to each of such paragraphs should be overruled. *Idem* 294
5. **Amendment.** Under Rev. Laws 1910, sec. 4790, amendment to pleadings in furtherance of justice may be allowed during the trial, where the cause of action or defense is not substantially changed thereby. *American Warehouse Co. v. Gordon*..... 613
6. **Same—Conversion.** Where, in an action for conversion, the answer was a general denial, and evidence tending to show purchase and payment was excluded because not within the issues, an application for permission to amend to plead purchase and payment was improperly denied. *Idem* 618
7. **Amendment of Petition—Discretion—Death of Railroad Employee.** In an action for the death of a railroad employee the allowing of an amended petition immediately before trial, which did not substantially change plaintiff's claim, was within the discretion of the court. *St. Louis & S. F. R. Co. v. Long*..... 177
8. **Motions—Judgment on Pleadings.** A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact to be tried. *St. Louis & S. F. R. Co. v. Kerns*..... 167
9. **Same—Effect of General Denial—Replevin.** Where the answer in replevin contained several defenses in addition to a general denial, a motion for judgment on the pleadings was properly overruled. *First State Bank of Mannsville v. Howell*..... 216
Same v. Lawson 226
10. **Same—Reply—General Denial.** Where the reply to an answer setting up a discharge in bankruptcy, in addition to a general denial, alleged particular but insufficient facts to avoid the effect of the discharge, held, that a judgment on the pleadings was proper, notwithstanding the general denial. *Chambers v. Kirk* 696

POSSESSION—See "Adverse Possession"; "ChamPERTY and Maintenance"; "Chattel Mortgages"; "Forcible Entry and Detainer"; "Homestead"; "Property"; "Public Lands"; "Sales," 3; "Use and Occupation."

PRACTICE—See "Appeal and Error," "Trial," and various specific topics.

PRACTICE OF MEDICINE—See "Physicians and Surgeons."

PRESUMPTIONS—See "Death," 1-4; "Descent and Distribution"; "Evidence," 1; "Marriage"; "Property"; "Railroads," 9.

PRINCIPAL AND AGENT—See "Bills and Notes," 4; "Brokers"; "Insurance," 7, 10.

1. **Proof of Agency—Competency.** Agency and the extent of authority may be proved by the testimony, though not by the declarations, of the agent. *Whitcomb v. Oiler*..... 331
2. **Acts of Agent—Liability of Principal.** One who, with knowledge of a given transaction, accepts the benefits flowing therefrom, done by one assuming, though without authority, to be his agent, ratifies

PRINCIPAL AND AGENT—Continued.

the act, and is liable therefor to the same extent as if authority to act had been previously given. *Idem*..... 331

PRINCIPAL AND SURETY—See “Justices of the Peace,” 6.

PRIORITIES—See “Chattel Mortgages.”

PRIZES—See “Rewards.”

PROBATE PROCEEDINGS—See “Courts”; “Equity”; “Indians,” 8; “Wills.”

PROCESS—See “Justices of the Peace,” 1, 2.

PROMISSORY NOTES—See “Bills and Notes.”

PROPERTY:

Ownership—Presumption From Possession. In the absence of evidence to the contrary, a presumption of ownership of real or personal property arises from the possession and control of such property. *Midland Val. B. Co. v. Larson*..... 360

PROSECUTION—See “Malicious Prosecution.”

PROXIMATE CAUSE—See “Carriers,” 8-11; “Negligence,” 5, 6.

PUBLICATION—See “Libel and Slander.”

PUBLIC FUNDS—See “Appeal and Error,” 53; “Injunction.”

PUBLIC HIGHWAYS—See “Highways.”

PUBLIC IMPROVEMENTS—See “Municipal Corporations,” 1-4.

PUBLIC LANDS—See “Evidence,” 1.

1. **Decisions of Interior Department—Review by Courts.** The courts will not disturb decisions by the Department of the Interior based purely upon findings of fact from the testimony submitted, where there is no fraud nor apparent error of law in such department decisions. *Baltz v. Mitchell*..... 96
2. **Chickasaw Town-Site Commission—Jurisdiction — Successor — Lot Contest.** A Chickasaw town-site commission, acting under Act Cong. June 28, 1898, could decide a contest between conflicting claimants to a preference right to purchase a town lot, and, on abolition of the commission, its jurisdiction was transferred to the United States Indian Inspector for Indian Territory. *Johnson v. Riddle*..... 759
3. **Same—Contest—Determination.** A Chickasaw town-site commission, acting under the Atoka Agreement of June 28, 1898, should decide, on a contest for the preference right to purchase a lot, whether the improvements are sufficient, and which claimant owns them, and should award the preference to such owner, regardless of former possession not involved in such ownership. *Idem*..... 759
4. **Erroneous Patent—Remedy of Rightful Claimant.** A patent issued by the Land Department to the wrong person, through gross mistake or fraud, may, on proof thereof on final hearing before the department, be so treated as to charge the legal title of the patentee with the equitable right of the rightful claimant. *Idem*.... 759

PUBLIC OFFICERS—See "Officers."

PUBLIC POLICY—See "Contracts," 5.

PUBLIC PROPERTY—See "Mechanics' Liens."

RAILROADS—See "Carriers"; "Contracts," 5; "Damages," 1; "Eminent Domain"; "Evidence," 13, 14; "Limitation of Actions"; "Master and Servant," 6; "Release"; "Trial," 2, 14, 15; "Waters and Water Courses."

1. **Action on Bonus Note—Petition—Sufficiency.** A petition, in a railroad company's action on a bonus note, held sufficient, under Comp. Laws 1909, sec. 5627, as against objections that it was indefinite and uncertain, and failed to state a cause of action. *Coyle v. Arkansas V. & W. Ry. Co.*----- 648
2. **Lien for Construction—Subcontractor's Lien—Waiver.** A subcontractor's right to a lien on railroad property under Comp. Laws 1909, sec. 6166, held not waived where the action was brought therefor after the award of the resident engineer had been published. *Kansas City Southern Ry. Co. v. Tansey*----- 543
3. **Lien for Labor.** Under Laws 1907-08, c. 50 (Comp. Laws 1909, sec. 6166), persons who furnish labor upon a roadbed are entitled to a lien on the railroad property. *Idem*----- 543
4. **Same—Contractors and Subcontractors.** Contractors and subcontractors are included within Comp. Laws 1909, sec. 6166, giving liens for railroad work. *Idem*----- 543
5. **Damages to Crops Incident to Construction.** Where a railroad company, unlawfully entering on land, tears down the fences, thus permitting animals to destroy crops, it is liable for the damage. *Missouri, O. & G. Ry. Co. v. Brown*----- 70
6. **Action for Killing Cattle—Duty to Fence.** By statute (section 1389, Comp. Laws 1909, section 1435, Rev. Laws 1910) it is made the duty of railroad companies to fence their roads, except at public highways and station grounds, with a good and lawful fence. *St. Louis & S. F. R. Co. v. Smith*----- 163
7. **Same—Question for Jury.** Whether a certain place constitutes a part of the station grounds, or a public highway, where the railroad company is by statute exempt from maintaining a fence, is a question of fact for the jury trying the case. *Idem*----- 163
8. **Same—Sufficiency of Evidence.** The fact that the evidence may show the cattle were killed at a railroad crossing, relatively near a station platform, is not sufficient proof that the killing occurred either at a public highway or a station grounds. *Idem*----- 163
9. **Killing Trespassing Animals—Presumption of Negligence.** In an action against a railroad company for killing trespassing animals, negligence will not be presumed, in the absence of statute, from the mere fact of accident, which is as consistent with the presumption that it is unavoidable as it is with negligence. *St. Louis & S. F. R. Co. v. Smith*----- 314
10. **Same—Liability.** In the absence of negligence, a railroad company is not liable for animals injured or killed, when they come upon the track at a place where it is not required by law to be fenced, such as station grounds. *Idem*----- 314

RAPE:

1. **Civil Liability.** Rape gives the female a cause of action for damages against the perpetrator. *Priboth v. Haveron*..... 692
2. **Same—Right of Action.** A civil action for damages for an assault may be maintained by, or in behalf of, a female under the age of sixteen years, where the assault is so committed as to constitute rape, under Rev. Laws 1910, sec. 2414. *Idem*..... 692

RATIFICATION—See “Principal and Agent.”

REAL ESTATE AGENTS—See “Brokers.”

RECEIVERS:

- Application for Appointment—Hearing.** A judge of the district court in a proper case may hear an application for the appointment of a receiver at chambers, at a point in the judicial district outside of the county wherein the action is pending in which the receiver is asked. *Glass v. Gould* 424

RECORDS—See “Appeal and Error,” 6, 11, 15-24, 32, 43, 44; “Bills and Notes,” 3; “Courts”; “Evidence,” 5-11, 17.

REFERENCE—See “Appeal and Error,” 11, 19.

REFORMATION OF INSTRUMENTS—See “Appeal and Error,” 37.

- Grounds—“Mutual Mistake”—Proof.** The law does not authorize the reformation of a written contract on the ground of mutual mistake (i. e., a mistake by each of the parties thereto) unless the proof of such mutual mistake is clear and convincing. *Schafer v. Midland Hotel Co.* 111

REHEARING—See “Carriers,” 14.

RELEASE:

1. **Right to Avoid—Personal Injuries—Fraud.** A written release from liability for personal injuries will be set aside when procured through fraud. *St. Louis & S. F. R. Co. v. Chester*..... 369
2. **Same.** A release of liability for personal injuries, when honestly procured, cannot be avoided for slight reasons. *Idem*..... 369
3. **Same—Proof.** Where defendant, in a personal injury case, sets up a written release, plaintiff's evidence that it was procured through fraud must be clear and convincing as to the particular facts constituting the fraud. *Idem* 369

REMAND—See “Appeal and Error,” 57, 60.

REMEDY AT LAW—See “Equity”; “Injunction.”

REMITTITUR—See “Appeal and Error,” 58; “Carriers,” 14.

RENT—See “Chattel Mortgages”; “Landlord and Tenant”; “Use and Occupation.”

REPAIRS—See “Negligence,” 4.

REPLEVIN—See “Appeal and Error,” 2; “Chattel Mortgages”; “Justices of the Peace,” 4; “Pleading,” 9; “Sales,” 3.

- Measure of Damages—Wrongful Detention.** The measure of damages for the wrongful detention of a team of work mules is the usable value thereof while they were wrongfully detained. *First State Bank of Mannsville v. Howell* 216
- Same v. Lawson** 226

REPLY—See “Pleading.”

REPUTATION—See “Marriage.”

REQUESTED INSTRUCTIONS—See “Trial.”

RESCISSION—See “Cancellation of Instruments”; “Husband and Wife,” 4-7; “Sales,” 4-6; “Specific Performance”; “Vendor and Purchaser,” 4-7.

RES JUDICATA—See “Judgment,” 9-12.

RESTRAINT OF TRADE—See “Contracts,” 1, 2; “Sales,” 7.

REVIEW—See “Appeal and Error.”

REWARDS:

1. **Public Offer of Prize—Petition—Essential Allegations.** In an action for a prize pursuant to an award made by a jury selected under stated conditions, the petition must either allege that the prize was thus awarded, or state facts showing that the award was prevented by defendant's fault. **Southwestern Land Co. v. McCallam** 657
2. **Same—Evidence—Question for Jury.** Where, in an action to recover a publicly offered prize, plaintiff's right to recover depends upon whether the prize has been awarded under stated conditions and the testimony is conflicting, the issue is for the jury. **Idem** 657

ROADS—See “Highways.”

RULES OF COURT—See “Briefs.”

SALARIES—See “Officers.”

SALES—See “Contracts,” 1-2; “Covenants”; “Equity”; “Evidence,” 7-9, 15; “Execution”; “Frauds, Statute of”; “Homestead”; “Indians,” 2; “Mortgages”; “Payment”; “Taxation”; “Vendor and Purchaser.”

1. **Written Contract—Merger of Oral Negotiations.** Where a final contract of sale fully covers the subject-matter of all prior oral negotiations, such negotiations are merged therein. **J. W. Bipy & Son v. Art Wall Paper Mills** 20
2. **“Actual Sale”—“Executory Contract to Sell.”** The distinction between an “actual sale” and an “executory contract to sell” is that in the former title immediately passes to the buyer even without delivery, while in the latter title remains in the seller until the contract is executed. **Oklahoma Moline Plow Co. v. Smith** 498
3. **Replevin by Seller—Insufficiency of Evidence.** In replevin of goods sold under a contract giving a right to take possession before maturity of the purchase-money notes if the buyer should sell out or become insolvent, evidence that the buyer had agreed to sell, that he had sent out notice in an endeavor to comply with the bulk sales act, and that a subsequent meeting of creditors was held, was insufficient to entitle plaintiff to bring replevin. **Idem** 498
4. **Rescission of Contract—Fraud.** Fraudulent representations made as to personalty by the seller's agent to induce a sale will justify a rescission by the buyer. **Couch v. O'Brien** 76

SALES—Continued.

5. **Same—Reasonable Time for Rescission.** Where a person who buys a piano is unacquainted with musical instruments and relies wholly upon false representations of the seller's agent as to its quality, he may rescind within a reasonable time after discovery of the fraud, by returning the piano to the agent. *Idem*..... 76
6. **Same—Question for Court.** What constitutes a reasonable time for taking steps to rescind a sale contract for fraud is a question of law for the court under the evidence in each case. *Idem* 76
7. **Action for Price—Illegality and Fraud—Burden of Proof.** Where, in an action for goods bought, the answer admits the contract and the receipt of the goods, and the only defense is that the contract is illegal and procured by fraud, the burden of proof is on defendant. *J. W. Ripy & Son v. Art Wall Paper Mills* 20
8. **Action on Note—Credit for Property Returned.** In an action on a note given for the price of machinery, where the property was returned under the contract, defendant was entitled to a credit for the reasonable value of the property when it was returned to plaintiff. *Wade v. Ray*..... 641

SCHOOLS AND SCHOOL DISTRICTS—See "Estoppel"; "Evidence," 15; "Mechanics' Liens."

SEALS—See "Appeal and Error," 23.

SELF-DEFENSE—See "Assault and Battery."

SEPARATION AGREEMENT—See "Husband and Wife," 4-7.

SET-OFF AND COUNTERCLAIM—See "Sales," 8.

1. **Action in Tort—Assigned Note as Set-Off.** Under the statute limiting the use of a set-off (Rev. St. 1910, sec. 4746), a defendant, in an action for conversion, cannot set off a note given by plaintiff to a stranger to the suit, and assigned to him. *First Nat. Bank v. Thompson* 88
2. **Same—Note as Counterclaim.** Under Rev. St. 1910, sec. 4746, limiting the use of a counterclaim, a note from plaintiff to a stranger to the suit, and assigned to defendant, cannot be used as a counterclaim where it is in no way connected with, and has no relation to, the contract or transaction made the basis of plaintiff's suit. *Idem*..... 88

SETTLEMENT—See "Compromise and Settlement."

SICKNESS—See "Continuance."

SLANDER—See "Libel and Slander."

SPECIFIC PERFORMANCE—See "Vendor and Purchaser," 7.

Vendor and Purchaser—Rescission of Contract—Remedies of Vendor. Where a vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default, the vendor should keep any payments as liquidated damages, the vendor, in addition to suing upon the notes, could enforce specific performance. *Shelton v. Wallace*---- 325

STATES—See "Appeal and Error," 53, 54; "Attachment"; "Injunction"; "Mechanics' Liens"; "Municipal Corporations," 12; "Physicians and Surgeons."

STATUTE OF FRAUDS—See “Frauds, Statute Of.”

STATUTE OF LIMITATIONS—See “Limitation of Actions.”

STATUTES—See “Appeal and Error,” 1, 7, 15, 22, 23, 46, 53; “Bastards”; “Bills and Notes,” 2, 7; “Bridges”; “Carriers,” 6; “Champerly and Maintenance”; “Chattel Mortgages”; “Commerce”; “Continuance”; “Convicts”; “Corporations,” 6; “Counties”; “Covenants”; “Death”; “Descent and Distribution”; “Divorce”; “Equity”; “Estoppel”; “Evidence,” 8, 15; “Forcible Entry and Detainer”; “Homestead”; “Indians”; “Injunction”; “Insolvency”; “Judgment,” 4-7; “Justices of the Peace”; “Landlord and Tenant”; “Libel and Slander”; “Lis Pendens”; “Master and Servant,” 1; “Mechanics’ Liens”; “Municipal Corporations,” 1-4, 12; “New Trial”; “Officers”; “Partnership”; “Pleading,” 5; “Public Lands”; “Rape”; “Railroads”; “Set-Off and Counterclaim”; “Telegraphs and Telephones”; “Trial,” 16; “Use and Occupation”; “Vendor and Purchaser,” 3; “Wills.”

Construction—Rule of Ejusdem Generis. The rule of *ejusdem generis* is resorted to merely as an aid in the construction of a statute and has no application where it clearly appears that the Legislature intended the general words to go beyond the class specifically designated. **Kansas City Southern Ry. Co. v. Tansey**-----

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STOCK—See “Animals.”

STREETS—See “Municipal Corporations.”

STRIKES—See “Trade Unions.”

SUBCONTRACTORS—See “Railroads,” 2-4.

SUCCESSION—See “Descent and Distribution.”

SUMMONS—See “Justices of the Peace,” 1, 2.

SURPRISE—See “Continuance.”

TAXATION—See “Corporations,” 6; “Escrows”; “Injunction”; “Mortgages”; “Municipal Corporations,” 1-4.

Tax Deed—Title. A tax deed regularly issued by the county treasurer, two years having passed since the tax sale and issuance of the certificate of purchase, vests in the grantee named in such deed an absolute fee-simple title in the land therein described. **Price v. Salisburg**-----

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TAX DEEDS—See “Mortgages”; “Taxation.”

TELEGRAPHS AND TELEPHONES:

1. **Telegraph Companies—Status in Indian Territory**—“Common Carriers.” Under the laws in force in the Indian Territory prior to statehood, telegraph companies were not “common carriers.” **Western Union Telegraph Co. v. Dobyns**-----

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2. **Same—Transmission of Message—Law Governing.** In an action for failure to transmit a message in the Indian Territory prior to statehood, the law then in force there, including decisions of the federal courts, must govern. **Idem**-----

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TELEGRAPHS AND TELEPHONES—Continued.

3. **Same—Contract Limitation of Liability.** Under the law in force in the Indian Territory prior to statehood, telegraph companies could by contract provide that an unrepeatd message should be sent at the sender's risk at a certain rate or, when repeated, at the company's risk at an increased rate. **Idem**----- 403
4. **Same.** Under the law in force in the Indian Territory prior to statehood, a telegraph company could by contract provide for its exemption from liability for error in unrepeatd messages, in the absence of willful misconduct or gross negligence. **Idem**----- 403

TENANCY—See "Landlord and Tenant."

TITLE—See "Adverse Possession"; "Champerly and Maintenance"; "Covenants"; "Forcible Entry and Detainer"; "Homestead"; "Mortgages"; "Public Lands"; "Taxation"; "Vendor and Purchaser," 1-3, 8, 9.

TORTS—See "Assault and Battery"; "Carriers"; "Damages"; "Death"; "Eminent Domain"; "Evidence," 12; "False Imprisonment"; "Libel and Slander"; "Limitation of Actions"; "Malicious Prosecution"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroads"; "Rape"; "Release"; "Trover and Conversion"; "Waters and Water Courses."

TOWN SITES—See "Public Lands."

TRADE UNIONS—See "Master and Servant," 3.

Employment of Non-Union Men—Right to Strike. Where union employees of a coal mining company demand that nonunion employees be discharged, and their demand is not heeded, they have a lawful right to strike. **Roddy v. United Mine Workers of America**----- 621

TRANSCRIPT OF RECORD—See "Appeal and Error," 15-18, 32.

TRANSFER OF CAUSES—See "Courts."

TREATIES—See "Indians."

TREES—See "Municipal Corporations," 5-9.

TRESPASS—See "Carriers," 4-7; "Death," 7; "Municipal Corporations," 8, 10; "Negligence," 1-3.

TRIAL—See "Appeal and Error," 1-5, 8, 25, 34, 43-53, 58; "Assault and Battery"; "Attorney and Client"; "Attachment"; "Banks and Banking"; "Carriers," 11, 13; "Constitutional Law"; "Continuance"; "Corporations," 4; "Husband and Wife"; "Judgment," 4; "Justices of the Peace," 5; "Libel and Slander"; "Marriage"; "Negligence"; "New Trial"; "Pleading"; "Railroads," 7; "Rewards"; "Sales," 6, 7; "Vendor and Purchaser," 10.

1. **Order of Proof—Discretion.** The order in which evidence shall be received must to a great degree be left to the sound discretion of the trial court, and, unless it is made to appear that such discretion has been abused, no reversal will be had. **Ackerman v. C. C. Chapell Hardw. Co.**----- 275

TRIAL—Continued.

2. **Reopening Case—Discretion.** Permitting plaintiff, in an action for death of a railroad employee, to reopen her case after both parties had rested and introduce further evidence held not an abuse of discretion. *St. Louis & S. F. R. Co. v. Long*..... 177
3. **Demurrer to Evidence—Effect.** A demurrer to the evidence admits every fact which the testimony and reasonable inferences therefrom reasonably tend to prove. *Midland Valley R. Co. v. Larson* 360
4. **Direction of Verdict.** A verdict should not be directed for defendant at the close of plaintiff's evidence, where such evidence, admitting its truth, together with all inferences reasonably to be drawn therefrom, would sustain a verdict for plaintiff. *Duncan Cotton Oil Co. v. Cox*..... 633
5. **Same.** Where the evidence was insufficient to sustain a verdict for plaintiff, a verdict was properly directed for defendant. *Flamm v. Wineland* 688
6. **Same—Negligence.** Where there is no evidence of negligence or from which negligence might be reasonably inferred, a verdict should be directed for defendant. *St. Louis & S. F. R. Co. v. Smith* 314
7. **Instructions—Assuming Facts—Carriers.** An instruction, in a passenger's action for injuries while riding as a caretaker of stock, to find for plaintiff if defendant was negligent, held not erroneous as assuming that plaintiff was rightfully in the stock car, where the evidence showed that he had a right to be there. *St. Louis & S. F. R. Co. v. Kerns*..... 167
8. **Instructions—Application to Evidence.** Evidence held not to warrant submission to the jury as an element of damage plaintiff's subsequent miscarriage. *St. Louis & S. F. R. Co. v. Criner*..... 256
9. **Instructions—Burden of Proof—Suit for Broker's Commission.** In an action by a broker for commission, where defendant pleaded fraud in the procurement of the contract by the insertion therein of terms not in accordance with the agreement of the parties, an instruction that if the jury believed, "from a preponderance of the testimony, that there was a contract which expressed the purpose and intention of the plaintiff and defendant" was not erroneous in imposing on plaintiff the burden of proving the validity of the contract. *L. L. Tyer & Son v. Wheeler*..... 335
10. **Instructions—Measure of Damages.** Instruction given on measure of damages in a shipper's action for damages to a shipment of sheep from delay in furnishing a car held not erroneous, in view of the entire charge. *Midland Valley R. Co. v. Larson*..... 360
11. **Instructions—Failure to Request.** Where a party fails to properly present to the court in writing a special instruction desired, and a general instruction applicable to the issues has been given, failure to instruct on any given proposition is not error. *Livingston v. Chicago, R. I. & P. Ry. Co.*..... 505
12. **Instructions — Refusal — Repetition.** Where instructions given fairly contain the substance of an instruction refused, the refusal cannot be assigned as error. *L. L. Tyer & Son v. Wheeler*..... 335
13. **Requests—Refusal—Negligence.** Where the court correctly defines ordinary care and contributory negligence, it is not error to refuse a differently worded instruction presenting the same matter. *St. Louis & S. F. R. Co. v. Long*..... 177

TRIAL—Continued.

14. **Same—Railroads.** Where uncontradicted evidence showed that safety would result from blocking dangerous open spaces between rails, and that such blocking system was used on certain other roads without introducing any new danger, it is not error to refuse to instruct that defendant's failure to so block would not render it negligent. *Idem* 177
15. **Same—Contributory Negligence and Assumption of Risk.** It is not error to refuse a requested instruction going beyond bare definition, as to the defenses of contributory negligence or assumption of risk, though they correctly state the law, where the jury are not instructed and the party presenting same does not request an instruction to the effect that such defenses are questions of fact for the jury. *Idem* 177
16. **Exceptions to Instructions—Sufficiency.** An exception stating that "the defendant excepts generally and specially to each and every instruction," held too general and insufficient, under Rev. Laws 1910, sec. 5003. *Duncan Cotton Oil Co. v. Cox* 633
17. **General Finding—Construction.** Where an action is tried to the court and a general finding is made in favor of the defendant, such general finding necessarily includes a special finding in favor of the defendant of every particular fact necessary to sustain the general finding. *Schafer v. Midland Hotel Co.* 111
18. **General Finding by Jury.** A general finding by a jury in favor of a party includes a finding in his favor on all the material issues in the case. *Walters Nat. Bank v. Bantock* 153

TROVER AND CONVERSION—See "Pleading," 6; "Set-Off and Counterclaim."

Measure of Damages—Right to Elect. The measure of damages for conversion of animals is ordinarily their fair market value at the time and place of conversion, with lawful interest thereon, and fair compensation for expenses in pursuit of the property; but the owner can elect to take the highest fair market value of the property at any time between the conversion and verdict, without interest, together with cost of pursuit. *First Nat. Bank v. Thompson* 88

TRUSTS—See "Assignments"; "Banks and Banking"; "Indians," 3; "Municipal Corporations," 4.

ULTRA VIRES—See "Banks and Banking"; "Corporations," 1-3.

UNION LABOR—See "Trade Unions."

USE AND OCCUPATION:

1. **Rents—Right to Recover.** In an action brought by the owner of real estate, entitled to the possession thereof, against the occupant, to recover for the use and occupation of the lands occupied, it is not necessary to allege in the petition either that the relation of landlord and tenant existed between the parties or that there was any contract between them, either express or implied, to pay rent. *Bilby v. Gilliland* 150
2. **Same.** Under the Oklahoma statute (section 4094, Comp. Laws 1909 [Rev. Laws 1910, sec. 3802]), the occupant of lands is, without special contract, liable for the payment of rents to any person entitled to the same. *Idem* 150

VACATION—See “Appearance”; “Divorce”; “Judgment.”

VALUE—See “Carriers,” 15, 16; “Evidence,” 2.

VARIANCE—See “Bills and Notes,” 7.

VENDOR AND PURCHASER—See “Brokers”; “Champerty and Maintenance”; “Covenants”; “Escrows”; “Frauds, Statute of”; “Homestead”; “Indians”; “Lis Pendens”; “Mortgages”; “Sales”; “Specific Performance”; “Taxation.”

1. **Contract of Sale—Implied Warranty of Title.** In the absence of an express provision indicating otherwise, the implication is that a good, marketable title in fee simple is intended in all executory contracts of sale of land. **Brady v. Bank of Commerce of Coweta** 473
2. **Same—Duration of Warranty.** The implied warranty that a marketable title is intended to be conveyed exists only until delivery of the deed. **Idem** 473
3. **Suit for Purchase Money—Defense—Breach of Covenants.** A purchaser in possession under a warranty deed, executed in substantial compliance with Comp. Laws 1909, sec. 1202, may set up broken covenants of seisin as a defense to a suit for the purchase money. **Idem** 473
4. **Rescission of Contract of Sale.** Where the vendor took notes due monthly for the deferred payments, and the purchaser took possession, and the contract provided that, on default, the vendor should keep any payments as liquidated damages, such contract could not be rescinded except by consent of both parties. **Shelton v. Wallace** 325
5. **Same—Default of Purchaser—Remedies of Vendor.** Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default, the vendor should keep any payments made as liquidated damages, upon the purchaser's default, the vendor was not confined to an action for breach of contract, but could enforce the purchaser's liability on the notes. **Idem** 325
6. **Same.** Where the vendor took notes for deferred payments and agreed to convey upon payment, and the purchaser took possession, the contract providing that, on default, the vendor should keep any payments as liquidated damages, the vendor could sue on a past due note which the purchaser failed to pay, deciding to repudiate the contract. **Idem** 325
7. **Same—Specific Performance.** Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default the vendor should keep any payments as liquidated damages, the vendor was not compelled to resort to specific performance before enforcing the notes. **Idem** 325
8. **Performance of Contract—Warranty Deed.** A contract to convey, by warranty deed, land the title to which is vested in a third person is not complied with by procuring a warranty deed from such third person to the purchaser. **Farm Land Mortgage Co. v. Wilde** 45
9. **Same—Terms as to Sufficiency of Abstract.** Where a contract for sale of land provides that the abstract shall be passed upon by a resident lawyer employed by the purchaser, either party may rely upon the opinion of such lawyer. **Idem** 45

VENDOR AND PURCHASER—Continued.

10. **Recovery of Purchase Money—Direction of Verdict.** Where, in a purchaser's suit to recover the purchase money paid, it appeared that the contract provided that the money should be returned upon a failure to do certain things, and the undisputed evidence showed such failure, a directed verdict for plaintiff was proper. *Idem* 45

VERDICT—See "Appeal and Error," 8, 33-40, 51, 52, 58; "Attorney and Client"; "Constitutional Law"; "Death," 17; "Trial," 4-6, 18; "Vendor and Purchaser," 10.

WARRANTIES—See "Covenants"; "Escrows"; "Vendor and Purchaser," 1-3.

WATERS AND WATER COURSES—See "Eminent Domain"; "Limitation of Actions."

- Railroads—Damages from Overflow—Instructions.** In an action for damages from overflow from inadequacy of the openings in a railroad embankment, an instruction as to the defective construction of a bridge was not erroneous because no specific complaint of the bridge was made in the pleadings, where it applied to no defect except the inadequacy of the opening beneath the bridge. *Atchison, T. & S. F. Ry. Co. v. Eldridge*..... 463

WILLS—See "Courts."

1. **Contests—Infants—Diligence.** Comp. Laws 1909, secs. 5166 and 5172, relative to the contest of wills, when construed together, relieve an infant of the diligence required of adults under the prior section to contest the probate of a will within one year, or show that the evidence relied on was discovered since the probate of the will. *Scott v. McGirth*..... 520
2. **Petition to Set Aside—Objections.** Where a petition to set aside the probate of a will, under Comp. Laws 1909, sec. 5166, is neither signed nor verified, the remedy is by motion to strike, and not by general demurrer. *Idem* 520
3. **Same—Appeal—Objections Below.** An objection to want of signature or verification to a petition to set aside the probate of a will cannot be first raised on appeal. *Idem*..... 520

WIRES—See "Municipal Corporations," 5-9.

WITNESSES—See "Continuance"; "Evidence."

Impeachment—Conviction of Crime. In ejectment, held not error to allow a witness to be asked if he had ever been convicted of a crime in the tribal courts of the Seminole Nation. *Perkins v. Baker* 288

WORK AND LABOR — See "Master and Servant"; "Parent and Child"; "Railroads," 2-4; "Trade Unions."

WRIT OF ERROR—See "Appeal and Error."

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